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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-791

CROSSROADS BOOKS, INC.
Petitioner,

v.

TOA ENTERPRISES, INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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I. Petitioner who was not a party to a criminal proceeding concerning the obscenity of specific items which have never finally been determined to be outside the protection of the First Amendment cannot later be held responsible for the unlawful conduct of the defendant to that criminal proceeding, in an unrelated equity proceeding instituted subsequent thereto against Petitioner, wherein the items alleged to be obscene were never submitted to the Chancery Court for scrutiny or review, and where no adversary proceeding was held by the Equity Court on the obscenity *vel non* of the material within clearly defined constitutional guidelines, or by that court before a jury to determine contemporary community standards, without violating the Petitioner's First and Fourteenth Amendment rights 14

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II. A single conviction of selling allegedly obscene film by a clerk, *which has not become final*, in a criminal proceeding to which Petitioner was not a party, is insufficient evidence to serve as a basis for determining that Petitioner used the leased premises for unlawful purposes in violation of its lease, and to allow such a conclusion results in a denial of due process of law under the Fourteenth Amendment to the United States Constitution, and is a violation of First Amendment rights and is in conflict with prior decisions of this court 19

III. The decision of the Supreme Court of Virginia is in conflict with the decisions of this court, and that court erred in not answering the serious federal question presented, to wit:

Can the Petitioner who was not a party defendant to criminal proceedings concerning the obscenity *vel non* of specific items, be subsequently held responsible for unlawful conduct of the defendant to the criminal proceeding who was convicted and whose conviction has not become final, where the obscenity of the items allegedly sold by the criminal defendant formed the basis of an equity suit to set aside a lease, and also formed the basis of the alleged unlawful activity of the Petitioner used to dissolve the lease agreement, and the resulting decree of the Chancery Court without an adversary hearing wherein the items alleged to be obscene are not brought before that court, without effecting a "chill" on the First Amendment rights of the Petitioner herein

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and the adult citizens of the State of Virginia, in addition to a denial of due process of law guaranteed under the Fourteenth Amendment to the United States Constitution 23

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above entitled case on September 2, 1977.

OPINIONS BELOW

On February 19, 1976, a Bill of Complaint was filed by the Respondent herein against the Petitioner herein in the Circuit Court for the County of Fairfax in Virginia and the case was thereafter tried on September 22, 1976 before the Honorable James Keith. The Bill of Complaint is attached as Appendix "A" hereto. (A. 1)

In its Complaint the Respondent herein prayed that the then existing lease agreement be rescinded on the basis that: 1) Petitioner herein had fraudulently represented itself during the lease negotiations, 2) Petitioner had engaged in unlawful activity contrary to the lease and 3) that exterior signs had been erected in violation of the lease as attached in Appendix "B" hereto. (A. 7)

At the Conclusion of the trial in the case styled as *TOA Enterprises, Inc. v. Crossroads Books, Inc.*. In Chancery No. 48925, his Honor James Keith found in favor of the Complainant, TOA Enterprises, Inc. in that:

> ". . . The tenant (Crossroads Books, Inc.) used the property for an unlawful activity. . . and that it constituted a default in the performance by the tenant." As reported in the Transcript attached hereto as Appendix "C". (A. 19)

On the Seventh day of October, 1976 a Decree was entered by the Circuit Court of Fairfax County declaring that Crossroads Books, Inc., Defendant therein,

> ". . . has violated the provisions of Article 11 of the Lease Agreement dated September 8, 1976. . . and

> that said Lease is hereby terminated," The Decree is attached hereto as Appendix "D". (A. 91)

The Petitioner filed a timely Petition for Appeal to the Supreme Court of Virginia. On July 29, 1977 the Supreme Court of Virginia, by written order, denied the Petition for Appeal. The Order of Denial is not reported and without opinion and is set out as Appendix "E" hereto. (A. 93) The Supreme Court of Virginia Docket is recorded as R-770095.

The Petitioner filed a timely Petition for Rehearing on August 11, 1977 which was denied without opinion in a written order entered on September 2, 1977 by the Supreme Court of Virginia. The Petition for Rehearing is attached hereto as Appendix "F" (A. 94) and the Order denying the Petition is attached hereto as Appendix "G". (A. 97) It is from this Denial of the Petition for Rehearing that Petitioner herein prays for relief.

JURISDICTION

The Decree of the Circuit Court for the County of Fairfax was entered on October 7, 1976 upon a Bill of Complaint. The Petition for Appeal to the Supreme Court of Virginia was denied on July 29, 1977. The Denial of the Petition for Rehearing by the Supreme Court of Virginia was entered on September 2, 1977 and thus final. *Chicago G.P.R. Company v. Basham*, 249 U.S. 164. The jurisdiction of this Court is invoked under Title 18, U.S.C.A. Section 1257.

QUESTIONS PRESENTED

1. Can an Equity Court in a proceeding to set aside a lease use a jury determination of obscenity in an unrelated

criminal proceeding as a basis for determining unlawful conduct of the Petitioner who was not a party to that unrelated criminal proceeding, without conducting its own determination as to the obscenity issue in an adversary proceeding following the mandates of this Court without being in conflict with this Court's decisions and without violating Petitioner's First and Fourteenth Amendment Rights?

2. Does an Equity Court in a proceeding to set aside a lease have the jurisdiction to make an obscenity determination without violating Petitioner's First and Fourteenth Amendment Rights?

3. Can a single conviction of selling allegedly obscene film by a clerk, which has not become final, in a criminal proceeding to which the Petitioner herein was not a party be sufficient evidence to serve as a basis for determining that Petitioner used the leased premises for unlawful purposes in violation of its lease, and not violate the First and Fourteenth Amendment Rights of the Petitioner?

4. Is the decision of the Supreme Court of Virginia in conflict with the decisions of this Court and was the Petitioner denied its Constitutional Rights by the failure of the Supreme Court of Virginia to answer the serious federal question presented to it, to wit:

Can a party who is not a party to a proceeding concerning the obscenity of a specific item be held responsible for unlawful conduct of another party without violating the First and Fourteenth rights of that party?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and of the Code of Virginia, as amended, Section 18.1 -227 et seq, are set forth as Appendix "H" hereto. (A. 98)

STATEMENT OF THE CASE

On September 8, 1975 a written lease was made between TOA Enterprises, Inc., Landlord, and Crossroads Books, Inc., Tenant, for the premises known as 5898 Leesburg Pike, Falls Church, Virginia. The Lease was executed by Lila L. Dominquez, President of TOA Enterprises, Inc. and by Johny R. Jones, President of Crossroads Books, Inc. A Dennis Pryba signed as guarantor of payment of the rent by the Tenant. (A. 7-18)

Pursuant to the terms of the lease the date of commencement was September 15, 1975 to run for five (5) years until the date of termination, August 31, 1980. Under the use provision of the Lease the Tenant was to "use the premises for the sale of books, magazines, and related material." (A. 7) The Lease also stipulated that the Tenant would not use or occupy said premises "for any purpose contrary to law . . ." (A. 10)

On October 2, 1975 the Landlord sent a registered letter to the Tenant, Petitioner herein, to complain of exterior signs erected in violation of the Lease. Testimony during the subsequent trial revealed that no exterior signs were present at the demised premises. (A. 43) On November 6, 1975, the Landlord, through her attorney, sent another letter to the Tenant ordering the Tenant to vacate the premises for violating the following Lease provisions: Art. IV, sole purposes of use of the premises, Art. XI, purposes contrary

to law, and Art. XIII, exterior signs without prior written consent. (A. 47-48)

A Bill of Complaint was filed on February 19, 1976 by the Landlord asking that the then existing Lease with Petitioner herein be rescinded, that Crossroads Books, Inc. be ejected, and for money damages. On March 17, 1976 a demurrer was filed on behalf of Petitioner herein stating that Respondent herein was seeking legal remedies on the Chancery side of the Court. On May 28, 1976, after argument of both counsel was heard the demurrer was overruled. Argument was heard on July 12, 1976 on the demurrer of the Respondent herein against the cross-bill of Petitioner herein at which time the demurrer was sustained and Crossroads Books, Inc. was granted leave to file an amended cross-bill.

The case was set before the Honorable James Keith on September 22, 1976 in the Circuit Court for the County of Fairfax in Virginia.

During the course of the trial Mr. Marin, counsel for the Complainant, stated:

> "Your Honor, the ground for equitable relief is fraud in the procurement of a lease agreement from Mrs. Dominquez who is the president and stockholder of TOA Enterprises, Inc., the Landlord." (A. 20)

Notwithstanding the fact that Mrs. Dominquez testified that she had experience in negotiating leases (A. 24), that she had been involved in real estate for ten years (A. 38), that she wanted a family-type bookstore (A. 40), and that

she had prepared the lease with her husband (A. 28), (A. 39), no language was inserted into the lease requiring the Tenant to establish a family-type bookstore. (A. 39)

Judge Keith allowed the Complainant to call Detective Jessee Sutherland of the Fairfax County Police Department as a witness on the illegal activity issue of the Petitioner herein. Detective Sutherland testified that on October 17, 1975 he

> "purchased a film from an employee within the premises of the store," (A. 50)

that the title of the film was "Succulent Housewife" (A. 50), and that he took the film to a special magistrate's home where, upon viewing the film, the magistrate said he believed the film was obscene (A. 51), and a warrant would be issued. However, the film involved was never presented to the Chancery Court in the Petitioner's trial below for review or for inspection.

Detective S.L. Craven was also allowed to testify on behalf of the Complainant in the Chancery Court. He testified that on October 16, 1975 he visited Defendant's store and purchased a film titled "Don't Let the Bedbug Bite, Part 1" and that later that day he took that film to a special magistrate who, upon viewing the film believed". . . it was obscene and a warrant was subsequently issued." (A. 59-60) The film involved was never presented to the Chancery Court for review or inspection.

The clerk, Allan R. Sands, was arrested on October 21, 1975 under a warrant signed by special magistrate Gordon W. Bell for violating Section 18.2-381 of the 1950 Code of Virginia, to wit: selling an obscene film on October 16 and on October 17.

On March 3, 1976 Mr. Sands was convicted in the Circuit Court of Fairfax County before the Honorable William Plummer in a jury trial. Mr. Sands was convicted for selling two obscene films in Criminal Cases 22429 and 22430 which are unreported. The jury ordered twelve months imprisonment for each felony conviction. (A. 52) On the day set aside for Post-Trial Motions to be argued Mr. Sands committed suicide. He had not yet been sentenced.

Counsel for the Defendant objected to the introduction of the evidence of illegal activity on the part of Mr. Sands on the basis that the issue in the criminal case was not final and that for that reason that case had no bearing on the trial of the Petitioner herein in an equity proceeding especially in view of the fact that the Petitioner herein was not a party to that criminal proceeding of which the adjudication was not final. The counsel for the Petitioner herein also argued that there had been sales of the same material where the person charged was not convicted. (A. 80)

On October 7, 1976 a Decree was entered stating that Defendant, Crossroads Books, Inc. has

> ". . . violated the provisions of Article 11 of the Lease Agreement dated September 8, 1975, by and between TOA Enterprises, Inc., and Crossroads Books, Inc. which violation constitutes a default under the terms of said Lease by Defendant. Accordingly. . . said Lease is hereby terminated, the Complainant is entitled to possession of the premises and the Defendant is hereby ORDERED to vacate. . ." See Appendix "D". (A. 91)

It is clear that Judge Keith, in the equity proceeding below, was "not satisfied" with the fraud basis of the Bill

of Complaint (A. 89) in his own words. It is clear that the exterior signs violation was a moot point by the admission of Mrs. Dominquez, President of TOA Enterprises, Inc. (A. 43)

The sole basis for granting the Decree rests on the count in the Bill of Complaint that alleges the Petitioner herein engaged in unlawful activity. In considering the tenor of the trial the Petitioner's First Amendment rights were "chilled" in a manner repugnant to the Constitution of the United States.

A timely Petition for Appeal was made to the Supreme Court of Virginia and on July 29, 1977 it was denied in a written order without opinion. The Petition for Rehearing was filed and later denied on September 2, 1977 again by written order and without opinion. See Appendix "E", "F" and "G".

The First and Fourteenth Amendment Rights of Crossroads Books, Inc., Petitioner herein, and the First Amendment rights of the citizens of Virginia to receive presumably protected First Amendment materials have, as a result of the Decree issued by the Circuit Court of Fairfax County on the most tenuous basis, been usurped in violation of the Constitution of the United States.

HOW FEDERAL QUESTIONS ARE PRESENTED

On behalf of the Petitioner, the trial court below was presented with the argument that until there has been a final determination through the Appellate System, the material is presumptively protected expression and the sale of one item and a conviction thereon in a case that Petitioner was not a party to cannot be construed to indicate that Petitioner was using or occupying the leased premises contrary to law in

violation of the lease. See (A. 80-81) In its Petition for Appeal to the Supreme Court of Virginia, Petitioner argued that the trial court erred in finding that Petitioner used the leased premises for an unlawful purpose or contrary to law without a final finding that the materials being sold in the store were being sold illegally. It is noted that there was never an opportunity in the trial court in equity to litigate the obscenity of the allegedly obscene films nor were the films even introduced into evidence, nor was a jury present to determine contemporary community standards.

Petitioner's argument in the trial court was rejected, and the Supreme Court of Virginia, by its Denial of the Petition for Appeal and by its Denial of the Petition for Rehearing effectively affirmed the infirm Decree twice without so much as addressing the delicate and precious First and Fourteenth Amendments Rights of the Petitioner herein that the trial court had been so quick to deny. The fact that the Constitutional Rights of the Petitioner were raised in the trial court with special emphasis on the issue of obscenity further justifies the conclusion that the Decree effected a travesty of justice and impinged upon precious Constitutional Rights. In considering the obscenity issue, counsel for the Petitioner herein stated:

> "Your Honor, this is an area that Your Honor has some knowledge of it, because I believe you sat on a particular case involving some matters from another store. And until, Your Honor, a particular item is declared obscene, it loses its constitutionality or the protection of a Constitutional cloth." (A. 80)

(Obviously counsel's word "loses" was either a misstatement or typographical error for until an item is finally declared obscene it *maintains* its Presumptive First Amendment Protection, and to argue otherwise would be in conflict with the holdings of this Court)

Counsel for the Petitioner herein further stated:

> "There are a lot of matters that may be offensive. There are a lot of matters that may be upsetting. But until there is an adjudication by a judicial body that a particular item is obscene, it is not obscene." (A. 80)

The stance of the presiding judge was clearly shown by his response to the Defense counsel's above noted statement of law:

> "The lease says, Article 11, "The tenant agrees not to use, occupy, sell in any manner, any purpose contrary to law. . . *And don't you think they have sold illegal magazines and films?*", (emphasis supplied) (A. 80)

It is noted that the Judge had never seen the magazines or films of which he speaks, nor did he make his own determination following the mandates of this court in an adversary proceeding as to the issue of obscenity.

Counsel for the Petitioner herein clearly stated:

> "This is the uniqueness of the obscenity statute. It is not a crime until it is adjudicated as a crime. . . The constitutional protection that one has with

reference to selling a particular item, until that item is declared obscene, it in fact is not obscene. I think the law is clear on that." (A. 81)

The effect of counsels' statement was that the Equity Court must make its own determination following constitutional procedures mandated by this court, if it has jurisdiction to do so.

It is noted that counsel for Petitioner herein, at the trial level, raised fundamental First and Fourteenth Amendment rights of the Petitioner. It is clear that the finding of the presiding Judge, that "the tenant used the property for an unlawful activity" (A. 89) was in direct conflict with the holdings of this Court. See *Miller v. California*, 413 U.S. 15 (1973), *Heller v. New York*, 413 U.S. 483 (1973), *Roaden v. Kentucky*, 413 U.S. 496 (1973), *McKinney v. Alabama*, 96 S.Ct. 1189 (1976), and *City of Kansas City v. Darby*, 544 SW2d 529 (Jan. 10, 1977), cert. denied, No. 76-1397, for the issue of procedural due process in obscenity litigation. While the Petitioner's rights under the First and Fourteenth Amendments were raised before the Trial Court it was not necessary that these rights were raised with great precision. "If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67. The Petitioner states herein that the trial court improperly denied it the right of due process of law through the First and Fourteenth Amendments by refusing to apply the *Miller* guidelines as to determining the obscenity of the films involved, by refusing to apply the *McKinney* rule as to the right of a party to litigate the issue of obscenity *vel non* of the material which formed the basis of its alleged unlawful

activity wherein the same material was found obscene in another proceeding where the Petitioner had not been a party and that the Supreme Court of Virginia, in Denying the Petition for Appeal and Petition for Rehearing acted in direct conflict with the guidelines and decisions established by this Court.

Petitioner's argument in the Trial Court was rejected, and the Supreme Court of Virginia on July 29, 1977 rejected and refused the Appeal of the Petitioner in a written Order without opinion.

Petitioner herein never anticipated that the Supreme Court of Virginia would affirm the lower Court's ruling which in effect made binding on the Petitioner the finding of obscenity in a criminal proceeding to which Petitioner was not a party in direct conflict with McKinney, *supra*, nor did the Petitioner anticipate that the Supreme Court of Virginia would allow by its decision the lower Court to make a determination of obscenity in the fashion that it did without employing or following the Constitutional procedure mandated by this Court where the issue of the obscenity of material is in question directly or indirectly as a basis for determining the Petitioner's conduct. See McKinney, supra, *Herndon v. State of Georgia*, 295 U.S. 441 *Saunders v. Shaw*, 244 U.S. 317.

As a result of the unanticipated ruling of the Supreme Court of Virginia, based on the totality of the circumstances and the record, it became necessary to re-raise the Federal Question precisely as to the deprivation of due process of law, guaranteed to the Petitioner under the Fourteenth Amendment of the United States Constitution, and further, the denial of Petitioner's First Amendment rights. The Petition for Rehearing, filed on August 11, 1977 with the Supreme Court of Virginia asserted that the affirmation of the trial court's decision without opinion leaves a serious federal question

unanswered, thereby denying to Petitioner its rights under the First and Fourteenth Amendments to the United States Constitution. See Petition for Rehearing attached hereto as Appendix "F". The Petition for Rehearing was denied on September 2, 1977 without opinion and as stated the Supreme Court of Virginia denied the Petition "on mature consideration".

REASONS FOR GRANTING THE WRIT

1

This Court has the power to examine into the raising of the Federal Question, and if it is convinced that the highest State Court's refusal to deal with that question is a mere evasion this Court's jurisdiction can be asserted. See *Rodgers v. Alabama*, 192 U.S. 226.

PETITIONER WHO WAS NOT A PARTY TO A CRIMINAL PROCEEDING CONCERNING THE OBSCENITY OF SPECIFIC ITEMS WHICH HAVE NEVER FINALLY BEEN DETERMINED TO BE OUTSIDE THE PROTECTION OF THE FIRST AMENDMENT CANNOT LATER BE HELD RESPONSIBLE FOR THE UNLAWFUL CONDUCT OF THE DEFENDANT TO THAT CRIMINAL PROCEEDING, IN AN UNRELATED EQUITY PROCEEDING INSTITUTED SUBSEQUENT THERETO AGAINST THE PETITIONER, WHEREIN THE ITEMS ALLEGED TO BE OBSCENE WERE NEVER SUBMITTED TO THE CHANCERY COURT FOR SCRUTINY OR REVIEW, AND WHERE NO ADVERSARY PROCEEDING WAS HELD BY THE EQUITY

COURT ON THE OBSCENITY *VEL NON* OF THE MATERIAL USING CLEARLY DEFINED CONSTITUTIONAL GUIDELINES OR BY THAT COURT BEFORE A JURY TO DETERMINE CONTEMPORARY COMMUNITY STANDARDS, WITHOUT VIOLATING THE PETITIONER'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Petitioner in the Trial Court, and in the Supreme Court of Virginia argued that in view of the fact that the Appellate process had not been exhausted due to the suicide of Petitioner's employee, there was no final adjudication of guilt or obscenity. The Trial Court rejected this argument and the Supreme Court of Virginia, in effect, affirmed its decision.

In *Miller v. California*, supra, the majority of this Court agreed with Justice Brannon, in his opinion in *Paris Adult Theatre v. Slater*, 413 U.S. 49 (1973) wherein he stated:

> "... The problem is ... that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards have pronounced it so."

It is respectfully submitted that the Petition for Rehearing presented a serious Federal Question to the Supreme Court of Virginia which was left unanswered, and that the State Court's refusal to deal with that question is a mere evasion. See *Rodgers v. Alabama*, supra.

It must be noted that *Petitioner was not a party to the criminal litigation of its employee* and the issue of

obscenity was not determined in a Constitutional manner in the trial from which Petitioner appeals. Thus we have a situation similar to that in *McKinney v. Alabama*, supra.

In effect, the affirmation of the Trial Court imposes a restrain on the freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, therefore it is repugnant to the First and Fourteenth Amendments of the Constitution.

The instant case, while factually different from the *McKinney* case, supra, falls within the context and spirit of this Court's ruling in that case. In *McKinney*:

> "The Petitioner was convicted of selling material which had been judicially declared obscene. At his trial he was not permitted to litigate the obscenity *vel non* of the publication which was the basis of his prosecution, even though he had not been a party to the earlier civil adjudication in which it was held obscene." At 1191.

This Court reversed holding that the Petitioner must be afforded the opportunity to litigate the issue of obscenity of the item before he may be convicted of selling obscene material. At 1194.

In the Chancery Court the Complainant was allowed to bring the issue of obscenity in such a way as to preclude the Petitioner herein from litigating the obscenity *vel non* of the material allegedly sold just as the State of Alabama was permitted to utilize procedures that precluded the Petitioner in *McKinney* from litigating the obscenity *vel non* of the material as a defense to his criminal prosecution. In the

instant case the judicial determination of obscenity of the films was made in a criminal proceeding which was then applied to the unrelated equity proceeding, not instituted by the Commonwealth of Virginia, from which Decree the Petitioner herein appeals to this Court, having been denied relief from the Supreme Court of Virginia.

As found in the *McKinney* decision by this Court while the:

> "The Constitution obviously cannot force anyone to exercise the freedom of expression which it guarantees. Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights (as was not the case in the instant case as to the issue of obscenity), are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to do so and lost.
>
> But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others, (i.e., Petitioner herein). Nonparties like petitioner may assess quite differently the strength of their constitutional claims and may of course have very different views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose." At 1194.

As in *McKinney*, the Petitioner's rights of due process of law under the First and Fourteenth Amendments have been grossly denied by the application of a judicial

determination of obscenity of specific items in a proceeding wholly unrelated to the proceeding at bar and a proceeding in which the Petitioner was not a party. It is respectfully submitted that notwithstanding the mandate of this Court wherein a party, by due process of law, must be afforded the opportunity to litigate the issue of obscenity *vel non*, in the Chancery Court below neither were the two allegedly obscene films present for inspection or review, nor was there a jury present to determine contemporary community standards nor were the clearly defined constitutional guidelines required by this Court employed. Instead, the Petitioner was found guilty of unlawful activity based on the sale of two allegedly obscene films by an employee in a totally unrelated criminal action. In the Chancery Court below the presiding Judge allowed not a jury (see *Darby*, supra) to determine the contemporary community standards in accordance with the mandates of *Miller*, supra, *Heller v. New York*, supra, *Roaden* supra, but the testimony of two Northern Virginia residents who had never seen the alleged obscene items, in direct conflict with the mandates of this Court. Clearly, Petitioner, not a party to the criminal case in which the items used to prove unlawful conduct on its part were found obscene, has suffered a gross denial of its rights under the First and Fourteenth Amendments to the Constitution of the United States. The Chancery Court and the Supreme Court of Virginia failed to grasp the fact that when dealing with the issue of obscenity there is a "dim and uncertain line between proscribed obscenity and constitutionally protected expression" which necessitates the employment of the required guidelines as stated by this court in *Miller*, and in failing to follow these mandates the First and Fourteenth Amendment rights of the Petitioner

herein, not a party to the criminal proceedings below, were grossly denied and require the attention of this Court.

2

A SINGLE CONVICTION OF SELLING ALLEGEDLY OBSCENE FILM BY A CLERK, WHICH HAS NOT BECOME FINAL, IN A CRIMINAL PROCEEDING TO WHICH PETITIONER WAS NOT A PARTY, IS INSUFFICIENT EVIDENCE TO SERVE AS A BASIS FOR DETERMINING THAT PETITIONER USED THE LEASED PREMISES FOR UNLAWFUL PURPOSES IN VIOLATION OF ITS LEASE, AND TO ALLOW SUCH A CONCLUSION RESULTS IN A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND A VIOLATION OF FIRST AMENDMENT RIGHTS AND IS IN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

In the case of *Janowitz v. Janowitz*, 168 N.Y.S. 2d 739 (1958), in which a landlord sought to evict tenants who had been convicted of possession of policy slips, an alleged unlawful activity, the Court said:

> "The evidence establishes two convictions each for possession of a policy slip. This does not constitute use of the premises for unlawful purposes. The term, use of the premises, implies doing something customarily or habitually upon the premises. The evidence, therefore, must reveal customary and habitual illegal use of the premises."

In dismissing the landlord's petition, the court held that a single, isolated act did not constitute use, and even two separate convictions fell short of showing continuity and permanence. Also see *Lituchy v. Lathers,* 232 N.Y.S. 2d 627 (1962) (single conviction for possession of policy slips) and *190 Stanton Inc. v. Santiago,* 302 N.Y.S. 2d 693 (1969) (single conviction for possession of a hypodermic needle).

The case of *220 West 42 Associates v. Cohen,* 302 N.Y.S. 2d 494 (1969) comes within the factual ambit of the instant case. There, as in the case herein, the landlord sought to terminate the lease with the tenant on the grounds that allegedly obscene materials had been sold in the demised premises. There the landlord proceeded on the theory that the arrests made of sales personnel in the store were not, standing alone, sufficient grounds to terminate the lease for unlawful activity on the part of the tenant. That landlord awaited *finai convictions.* (emphasis supplied) The court fully agreed and stated that: "the arrests did not establish the crime and proof of the crime, aliundi convictions, would have been extremely onerous particularly in light of decisions of the United States Supreme Court dealing with the 'dim and uncertain line' between proscribed obscenity and constitutionally protected expression." Although in the instant case there was a "conviction" in criminal cases 22429 and 22430 this conviction was not final. The Defendant therein, Mr. Sands, had not exercised his right of appeal. Until the issue of obscenity of specific material therein was determined by five members of this Court, as stated in *Paris Adult Theatres v. Slaton,* supra, the judicial determination in the court below would be, at best, uncertain.

As in the case of *220 West 42 Associates v. Cohen,* supra, the "dim and uncertain line" of the First Amendment protections afforded to the press is an integral part of the case at issue. It is noted, as presented in the Petitioner's Appeal to the Supreme Court of Virginia that the notice of eviction in the letter of November 6, 1976 to the Petitioner herein followed the arrest of the Petitioner's employee by only three weeks. The notice of eviction preceded the trial of the employee, Mr. Sands, by over four months. The above is noted for it is a long standing proposition of the Anglo-Saxon system of justice that arrest per se does not determine guilt, and that until all appeals have been exhausted, and only then, can ultimate guilt be proven.

At the time of the Respondent's herein notice of eviction, Mr. Sands had only been charged. Thereafter, the trial was conducted, Mr. Sands was found guilty of selling two allegedly obscene films and an appeal was being filed when Mr. Sands committed suicide, thus the ultimate issue of guilt was never reached.

The vast majority of cases dealing with lease terminations based upon alleged illegal activities on the demised premises concern themselves with matters which are already made illegal by existing statutes, such as possession of gambling materials or drug paraphenalia. There is little doubt that possession of these items, when prohibited by a lease clause such as Article 11 in the present lease, could constitute a violation of the lease terms upon conviction of the unlawful activity and subject the tenant to an action for ejectment.

However, when the illegal activity concerns the sale of allegedly obscene literature, the issue of whether or not the material is obscene is not as clearly defined as other criminal activity. The fact that certain literature may be offensive or upsetting does not make it illegal. In Virginia, until there has been a prior adjudication by a judicial officer that the literature is obscene, and an arrest, trial, and if exercised, an appeal taken, the materials cannot be considered obscene and thus constitute the basis of an unlawful activity.

The fact of the matter is that the single conviction of Mr. Sands of selling allegedly obscene material was not final, and until the appellate process had been exhausted there could be no despositive finding or final adjudication of guilt on his part. It should be noted further that in view of the cases herein concerning the judicial interpretation of the word 'use', the courts have traditionally and consistently held that a single conviction falls far short of being 'customary and habitual'.

In summation, it can be clearly seen that since there was no final adjudication of Mr. Sands's guilt, there was no ultimate proof by TOA Enterprises, Inc. of illegal activity on anyone's part that could possibly be applied to Article 11 of the lease. Even if the Respondent asserted that one arrest constituted a breach of its lease with the Petitioner herein, it clearly failed to demonstrate a use by the Petitioner herein or its employee.

3

THE DECISION OF THE SUPREME COURT OF VIRGINIA IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, AND THAT COURT ERRED IN NOT ANSWERING THE SERIOUS FEDERAL QUESTION PRESENTED, TO WIT:

CAN THE PETITIONER WHO WAS NOT A PARTY DEFENDANT TO CRIMINAL PROCEEDINGS CONCERNING THE OBSCENITY *VEL NON* OF SPECIFIC ITEMS, BE SUBSEQUENTLY HELD RESPONSIBLE FOR UNLAWFUL CONDUCT OF THE DEFENDANT TO THE CRIMINAL PROCEEDING WHO WAS CONVICTED AND WHOSE CONVICTION HAS NOT BECOME FINAL, WHERE THE OBSCENITY OF THE ITEMS ALLEGEDLY SOLD BY THE CRIMINAL DEFENDANT FORMED THE BASIS OF AN EQUITY SUIT TO SET ASIDE A LEASE, AND ALSO FORMED THE BASIS OF THE ALLEGED UNLAWFUL ACTIVITY OF THE PETITIONER USED TO DISSOLVE THE LEASE AGREEMENT, AND THE RESULTING DECREE OF THE CHANCERY COURT WITHOUT AN ADVERSARY HEARING WHEREIN THE ITEMS ALLEGED TO BE OBSCENE ARE NOT BROUGHT BEFORE THAT COURT, WITHOUT EFFECTING A "CHILL" ON THE FIRST AMENDMENT RIGHTS OF THE PETITIONER HEREIN AND THE ADULT CITIZENS OF THE STATE OF VIRGINIA, IN

ADDITION TO A DENIAL OF DUE PROCESS OF LAW GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION . . .

The Commonwealth of Virginia provides two procedures by which material can be adjudged outside the protection of the First Amendment and by which a person can be found to be engaging in unlawful conduct, to wit:

1) a criminal prosecution

2) a complaint for injunctive relief and an adjudication of obscenity as to specific items alleged to be obscene

Both procedures are established by statute and are confined to the constitutional guidelines and due process procedures set forth by this Court.

In the instant case, the proceeding which determined the obscenity of specific items and the unlawful conduct of the Petitioner herein were not brought pursuant to the aforementioned statutory provisions by the Commonwealth of Virginia but to the contrary, were instituted by Petitioner's landlord and the chancery court below was without jurisdictional power to conduct a proceeding on the obscenity *vel non* of material adjudged to be obscene in an unrelated criminal proceeding that Petitioner was not a party to, nor did the chancery court have jurisdiction to determine the unlawful conduct of the Petitioner herein in the fashion that it did.

Assuming for the sake of argument that the chancery court was endowed with the jurisdiction to conduct a proceeding as to the obscenity *vel non* of certain specific materials and the unlawful conduct of the Petitioner herein, it did so in a grossly unconstitutional manner in direct conflict with the mandates of this court and therefore denied the Petitioner its rights under the First and Fourteenth Amendments of the United States Constitution.

There is no provision in law or in the decisions of this Court that allows a judicial officer such as the judge in the chancery court below to take judicial notice of a finding of obscenity in an unrelated criminal proceeding to which the Petitioner was not a party and use the same as a basis for determining the conduct of Petitioner in a totally unrelated equity proceeding. Further, it is a well-accepted doctrine that different courts and different juries may reach different conclusions as to the obscenity of an item in different proceedings.

And the failure of the chancery court to conduct a constitutionally permissible inquiry of the obscenity *vel non* of certain materials, and this Petitioner's alleged unlawful conduct was and is in conflict with this Court's decisions and a denial of Petitioner's constitutional rights under the First and Fourteenth Amendments.

In effect therefore, the failure of the Supreme Court of Virginia to deal directly with these very serious federal questions and constitutional invasions of Petitioner's rights by the trial court allows a conflict of decisions to exist in connection with this Court's prior decisions and requires this Court to intervene in order to maintain uniformity of

decision in these serious constitutional areas and in order that this Court's integrity may be maintained.

CONCLUSION

This Court has limited the States by virtue of its decision in *Miller v. California*, supra, to constitutionally permissible procedures in their attempt to regulate the dissemination of "hard core" materials which are determined in a judicial proceeding to be obscene and also in their attempt to punish persons for violating the obscenity statutes. This Court has further mandated that individuals have a right to challenge a declaration as to the obscenity of certain materials in an adversary judicial proceeding employing specific constitutional guidelines.

It would be in direct conflict with this Court's prior decisions to allow a proceeding as was instituted and conducted in the trial court below to be used as an indirect method of usurping the restrictions placed by this Court on States in connection with the issue of obscenity. There is no question and the record is clear that the Petitioner herein did not have an opportunity to litigate the issue of obscenity in the trial court below, nor did that court in reaching a conclusion as to Petitioner's conduct and the obscenity *vel non* of specific items follow the constitutional mandates of this Court. The Record is clear that the proceeding below was instituted alleging three grounds for breach of the Lease, which are as follows: sole purposes of use of the premises (Art. IV), use of the premises for unlawful purposes (Art. XI), and exterior signs erected without prior written consent (Art. XIII). The Trial Court did not find in favor of the Landlord on the grounds of

fraudulent statement of uses by the Tenant nor was the basis of exterior signs upheld against the Tenant but the Court only dealt with the issue of uniawful conduct on the part of the Petitioner, using as a basis for its finding the finding of obscenity of certain items in a criminal case to which Petitioner was not a party. This is where the Constitutional invasions of Petitioner's rights began, for if the Chancery Court had jurisdiction on this issue, the proceeding was conducted in a grossly unconstitutional manner.

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

BURTON W. SANDLER
Towson Towers
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777

Counsel for Petitioner

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TOA ENTERPRISES, INC.
Plaintiff

v.

CROSSROADS BOOKS, INC.
Defendant

Serve: Clerk of the State
Corporation
Commission

In Chancery No. 48925

BILL OF COMPLAINT
Filed February 19, 1976

TO THE HONORABLE JUDGE OF THE
ABOVE-STYLED COURT:

Your Plaintiff by its President, Lila L. Dominguez, respectfully represents:

1. That TOA Enterprises, Inc., is a District of Columbia corporation duly authorized to transact business in the State of Virginia and is the owner of certain real estate known as the Glen Forest Shopping Center at 5898-5918 Leesburg Pike, Falls Church, Virginia.

2. During the first week of September, 1975, and prior to September 8, 1975, the President of Plaintiff corporation, Lila L. Dominguez, entered into discussions with a Mr. Dennis Pryba, who represented himself to be acting for the Defendant, Crossroads Books, Inc.

3. During these discussions, Mr. Pryba advised the Plaintiff that Defendant wanted to rent space from Plaintiff in the Glen Forest Shopping Center for the sale of books and magazines. Mrs. Dominguez specifically asked whether it was going to be a family bookstore, good for the neighborhood, or whether Defendant Corporation was going to sell pornographic literature. Mr. Pryba unequivocally stated that it would be a family bookstore, and, further, the store would offer school supplies for sale to grade school children attending the nearby school.

4. Based upon the representation that the demised premises would be used as a family bookstore, like Brentano's, Mrs. Dominguez reduced the amount of rent originally requested from Six Hundred Fifty Dollars ($650.00) per month to Six Hundred Dollars ($600.00) per month and executed a Lease Agreement dated September 8, 1975, because she had wanted a family bookstore in her shopping center that would be a service to the community and the school children nearby. A copy of the Lease Agreement is attached hereto as Exhibit I and incorporated herein.

5. To the consternation and amazement of your Plaintiff, Mrs. Dominguez recently learned that the Defendant was using or permitting the use of the rented space for the sale of books, magazines, films and sexual paraphernalia considered by her and the neighbors to be obscene and pornographic and in no wise similar in nature to the books and reading material sold by Brentano's; and no reasonable man can conclude that the rented space is used for a family bookstore. The material offered for sale at the leased premises by Allan R. Sands is the same type of material which has been offered for sale by Mr. Sands in the past, of which the Plaintiff had absolutely no knowledge. Such material was found to be obscene.

6. The Plaintiff has requested Defendant corporation to leave the premises, and by letter dated November 6, 1975,

the Defendant was ordered to vacate the premises immediately. The Defendant has refused and continues to refuse to vacate the premises.

7. Since the Defendant has occupied the demised premises, Plaintiff has received many phone calls from neighbors and local citizen groups insisting and demanding that your Plaintiff remove the Defendant from the premises. These phone calls have been a continuous source of humiliation, unwarranted harrassment and abuse.

8. Allan R. Sands, manager of the bookstore, was, during the month of December, 1975, arrested for selling obscene film, and on January 20, 1976, was indicted for selling an obscene film in violation of the Code of Virginia as amended.

9. The Plaintiff has never agreed to permit the Defendant to use the demised premises for anything other than a family bookstore, like Brentano's, and for the sale of school supplies to the children attending the nearby school. The Plaintiff signed the lease based upon the representation, made by Defendant's agent, Dennis Pryba, that the demised premises would be used for a family bookstore, and for the sale of school supplies.

IN CONSIDERATION WHEREOF, your Plaintiff prays that the Court rescind and declare the above-mentioned Lease Agreement void, and decree that the Defendant produce said writing and deliver it up to be cancelled; and

That the Defendant corporation be ordered to vacate the premises forthwith; and

That proper counsel fees may be allowed to counsel of record for your Plaintiff for the institution and prosecution of this suit.

COUNT TWO

10. The averments of Paragraphs one through nine above are incorporated herein by reference.

11. In reliance on the false representation alleged above, the Plaintiff was induced to enter into a lease agreement on September 8, 1975. The Plaintiff has been damaged by the Defendant to the extent of the reduced rent and deprivation of the use of its property in respect of said lease.

WHEREFORE, Plaintiff prays that judgment be entered in its favor and against Defendant in the amount of Two Hundred Fifty Dollars ($250.00) together with interest and costs.

COUNT THREE

The averments of Paragraphs one through eleven are incorporated herein by reference.

12. Plaintiff owns in fee the premises known as 5898 Leesburg Pike, Falls Church, Virginia, the same being situated in the Glen Forest Shopping Center and comprising a one-story building measuring approximately 1,100 square feet in area.

13. By written agreement dated September 8, 1975, Plaintiff was induced by false representation to lease the above-described premises to Defendant for a term of five years commencing on the 15th day of September, 1975, and terminating on the 31st day of August, 1980.

14. Defendant took possession of the leased premises on or about September 8, 1975, subject to the terms and conditions of the lease and still occupies the same. During such occupancy of the demised premises, Defendant has violated and continues to violate Article XI thereof by using

the premises for a purpose contrary to law or the rules or regulations of Fairfax County or any or all of them by offering for sale obscene material.

15. Defendant continues to violate the terms of the lease and such rules and regulations and continues to do the same which greatly disturbs the other tenants of the shopping center; and on November 6, 1975, Plaintiff notified Defendant in writing that its lease has been terminated in accordance with the provisions of the lease for the following reasons:

a. Violation of Article IV by failure to use the demised premises solely for the sale of books, magazines and related material.

b. Violation of Article XI by using the demised premises for purposes contrary to law.

c. Violation of Article XIII by erecting exterior signs without the prior written approval of the landlord.

16. Said written notice from the landlord demanded that tenant vacate the premises on or before November 16, 1975. A copy of the notice is attached hereto as Exhibit II and incorporated herein.

17. Defendant failed and refused and continues to refuse to vacate the premises and has continued and continues to violate the terms, conditions and provisions of the lease agreement. More than sixty (60) days have elapsed since the service on Defendant of such notice; but Defendant refuses to quit the premises and surrender possession thereof to the Plaintiff. Defendant continues his possession of the premises without legal right and without Plaintiff's permission or consent, express or implied.

WHEREFORE, Plaintiff prays for an order directing Defendant to vacate the premises forthwith; and

That proper counsel fees may be allowed to counsel of record for your Plaintiff for the institution and prosecution of this suit together with costs expended.

TOA ENTERPRISES, INC.

/s/ Lila L. Dominguez,
President

APPENDIX B

LEASE AGREEMENT
between
TOA ENTERPRISES, INC., Landlord and
CROSS ROADS BOOKS, INC., Tenant

PARTIES:

Art. 1. This lease agreement in duplicate, made on September 8, 1975, between TOA ENTERPRISES, INC., a District of Columbia Corporation hereinafter referred to as Landlord and Cross Roads Books, Inc., hereinafter referred to as Tenant.

PREMISES:

Art. 2. WITNESSETH: That in consideration of rents and covenants set forth herein, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord, in the Glen Forest Shopping Center, 5898-5918 Leesburg Pike, Falls Church, Virginia, a one story building measuring approximately Eleven Hundred (1100) square feet in area (25 feet front by 44 feet in depth), known as 5898 Leesburg Pike, Falls Church, Va. Premises will be delivered by Landlord to Tenant in broom-clean condition with heating and airconditioning systems in good working order.

TERM:

Art. 3. The term of this lease shall be five (5) years commencing on the 15th. day of September, 1975 and terminating on the 31st. day of August 1980.

PURPOSE:

Art. 4. The demised premises shall be used by Tenant for the sale of books, magazines, and related material. The Landlord hereby agrees that during the term of this lease or

any option periods it will not lease or sub-lease stores in the Glen Forest Shopping Center to be used for the same purpose.

RENT:

Art. 5. Tenant agrees to pay to the Landlord as rent during the term of this lease the sum of Seven Thousand Two Hundred Dollars ($7,200.00) in equal monthly installments of Six Hundred Fifty ($650.00) Dollars. The first rent pay shall be_____ made in advance on or before the first and every month from the first day of October, 1975 to the termination of this lease. All rent payments are to be made to TOA ENTERPRISES, INC., 4905 Klingle St. N.W., Washington, D.C. 20016 or to such other person or corporation and such other place as shall be designated in writing by the Landlord.

REAL ESTATE:

Art. 6. In the event the real estate taxes on the land and buildings within the Glen Forest Shopping Center shall be increased in any tax year during the term of this lease over the amount of such taxes due and payable in the first full year after commencement of this lease, then, in that event, Tenant shall pay as additional annual rental, a proportion of such increase equal to the ratio which the floor area of the premises hereby leased bears to the total floor area of all stores in the shopping center, this ratio being percentum *NONE.*

RENEWAL OPTION:

Art. 7. Provided that Lessee shall not be in default in the performance of any of the covenants, conditions and agreements of this Lease, Tenant at its option shall have the privilege to renew this lease for a further term of *five* (5) years by signifying its intention in writing to the Landlord not later than six (6) months before the termination of this lease. Except that if there has been an increase in the Consumer Price Index for Washington, D.C., Virginia and

Maryland, now known as "United States Bureau of Labor Statistics, Consumer Price Index for Urban Wage Earners and Clerical Workers", all items for Washington, D.C., Maryland and Virginia, in such event, the rent for the renewal terms shall be increased by an amount equal to the percentage increase in the Index from the beginning of the term to the time of renewal.

ENJOYMENT:

Art. 8. The Landlord is lawfully seized of and in possession of the demised premises and agrees that the Tenant, upon paying the rent and performing all of the covenants of this lease, may quietly hold and enjoy the demised premises, free from hindrance or molestation by the Landlord, but subject, however, to all mortgages, liens and encumbrances affecting said premises.

ALTERATIONS:

Art. 9. Any improvements made by either of the parties hereto upon the demised premises, except moveable equipment and trade fixtures put in at the expense of the Tenant, shall be the property of the Landlord, and shall remain upon and be surrendered with the demised premises at the termination of this lease without molestation or injury. If the Tenant is not in default in performing any of its obligations hereunder, Tenant may remove its equipment or trade fixtures provided any damage done to the demised premises in the removal of any such equipment or trade fixtures is promptly repaired.

ASSIGNING SUBLETTING:

Art. 10. The Tenant agrees not to assign, mortgage, pledge or encumber this lease nor to sublet the whole or any part of the demised premises without the prior written consent of the Landlord, which consent shall not be unreasonably withheld.

USE:

Art. 11. Tenant agrees not to use or occupy or suffer or permit said premises or any part thereof to be used in any manner or occupied for any purpose contrary to law or the rules or regulations of any public authority or in any manner deemed a fire hazard or so as to increase the cost of hazard insurance to the Landlord over and above the normal cost of such insurance for the type and location of the building of which the demised premises are a part and for the intended business of Tenant.

REPAIRS:

Art. 12. The Landlord agrees to keep and maintain the roof and structural portions of said buildings, including concealed plumbing exclusive of doors and exclusive of windows, in good tenantable condition during the term of this lease.

The Tenant agrees to make and pay for all maintenance and repairs to the demised premises not herein specifically set forth to be the responsibility of Landlord, said repairs and maintenance to be performed by Tenant shall include, but not be limited to, repair and upkeep of the doors, windows, heating plant, air conditioning system, plumbing fixtures and equipment. The Tenant further agrees to maintain said demised premises in a clean, safe and healthy condition, and clean the snow and ice from the sidewalks and doorways of the demised premises.

The Tenant shall maintain the glass part of the demised premises, replacing any breakage at its own cost and expense.

SIGNS:

Art. 13. Tenant may, at Tenant's own risk, lawfully erect exterior signs, concerning the business of the occupant of the demised premises, but in doing so, Tenant agrees to maintain said signs in a good state of repair, save the Landlord harmless from any loss, cost or damage as a result

of the erection, existence, maintenance or removal of such signs, and provided further that the plan and location for same be submitted to and approved by the Landlord in writing before the erection or alteration thereof.

INDEMNITY & LIABILITY INSURANCE:

Art. 14. The Tenant during the term hereof shall indemnify and save harmless the Landlord from and against any and all claims and demands, whether for injuries to persons or loss of life, or damage to property resulting from any act or omission of the Tenant or Tenant's use or non-use of the demised premises. Tenant hereby agrees to pay, discharge by bond or deposit, or successfully defend against any and all such claims and demands.

Tenant shall keep in full force and effect at all times a policy of public liability insurance with respect to the leased premises and the business operated by the Tenant, in which both Landlord and Tenant shall be named as parties covered by the said insurance, or which provides equivalent protection to the Landlord and which is approved by the Landlord.

The limits of liability of such insurance shall be not less than Three Hundred Thousand Dollars ($300,000.00) per person, and One Million Dollars ($1,000,000.00) for each accident or occurence for bodily injury, and Twenty Five Thousand Dollars ($25,000.00) for property damages. Tenant shall furnish Landlord with a certificate or certificates of insurance, or other acceptable evidence that such insurance is in force at all times during the lease term. Tenant agrees to carry adequate insurance on all plate glass in the demised premises.

DAMAGE TO PREMISES:

Art. 15. If the demised premises are destroyed by fire or other casualty, to the extent that Tenant is deprived of occupancy of all of the demised premises or if the demised

premises are partially destroyed and the cost of restoring the demised premises to its position immediately prior to such damage shall equal or exceed forty percent (40%) of its fair replacement value immediately prior to such damage, the Landlord may, at its election (a) proceed with due diligence to repair or restore the same to the same condition as existed before such damage or destruction, or (b) cancel the lease as of the date of such damage or destruction by written notice not less than thirty (30) days after such damage or destruction. Should the Landlord elect to repair or restore, all rent shall abate until the demised premises are repaired or restored and possession has been redelivered to the Tenant. Should the Landlord elect to cancel, then the rent shall be adjusted as of said date on which the damage occurs.

If the demised premises are partially destroyed or injured, whereby the Tenant shall be deprived of only a portion of said premises, and the cost of repairing such damage shall not equal forty percent (40%) of the fair replacement value of the premises immediately prior to such damage, the Landlord will proceed with due diligence to repair the same to the same condition as existed before such damage or injury and a proportionate allowance shall be made from the minimum rent during the period required for such repairs, in the proportion which the number of square feet of which Tenant is deprived by such damage and the making of such repairs, bears to the total square feet in the demised premises.

MECHANIC'S LIENS:

Art. 16. The Landlord shall not be liable for any labor or materials furnished to the Tenant and no mechanic's or other liens for such labor and materials shall attach to or affect the Landlord's interest in the demised premises. The Tenant hereby agrees to pay, discharge by bond or deposit or successfully defend against any such liens, and failing to do so, the Landlord may, upon giving fifteen (15) days

written notice to the Tenant, pay or discharge the same and the amount so paid or deposited, together with interest at the rate of six percent (6%) per annum shall be deemed additional rent due hereunder and payable when the next installment of rent shall become due.

PERSONAL PROPERTY:

Art. 17. The Landlord shall not be liable for any loss or damage to personal property that may be occasioned by or through the acts or omissions of persons occupying adjoining premises or any part of the premises adjacent to or connected with the demised premises or any part of the building of which the demised premises are a part or for any loss or damage resulting to Tenant or its property from burst, stopped or leaking water or sewer pipes or from water damage however caused.

WAIVER OF SUBROGATION:

Art. 18. Landlord shall not be liable for any damage to fixtures or merchandise of Tenant caused by fire or other insurable hazards, regardless of the nature or cause of fire or other said hazards, and Tenant does hereby expressly release Landlord of and from all liability for such damages. Tenant shall not be liable for any damage to the demised premises caused by fire or other insurable hazards to any portion of the demised premises regardless of the nature or cause of fire or other said hazards, ande Landlord does hereby expressly release Tenant of and form all liability for such damages.

REDELIVERY:

Art. 19. The Tenant agrees to deliver to the Landlord physical possession of the demised premises upon the termination or expiration of the term hereof in good condition, ordinary wear and tear and damage by fire or the elements excepted, and to deliver all of the keys to the Landlord or Landlord's agent. No tenancy of any duration shall be created by holding over beyond the end of the term.

INSPECTION:

Art. 20. Landlord shall have the right to enter the demised premises during the last six (6) months of the term for the purposes of exhibiting same to prospective tenants and also to have free access to the demised premises to inspect or examine the demised premises at any reasonable time to have access to and to make such repairs to the building of which the demised premises are a part, that the Landlord may deem desirable or necessary for its safety or preservation.

NOTICE OF LANDLORD'S DEFAULTS:

Art. 21. If the Landlord mortgages the demised premises or any part thereof or premises of which the demised premises are a part and as an incident to such loan assigns this lease or the rentals to a mortgagee or trustee and the Tenant is given written notice thereof, including the post office address of the mortgagee or trustee, then the Tenant shall not terminate this lease for any default on the part of the Landlord without first giving written notice to the mortgagee or trustee, specifying the default in reasonable detail, and affording the mortgagee or trustee a reasonable opportunity to make performance for and on behalf of the Landlord. If and when the mortgagee or trustee has made performance on behalf of the Landlord, the default of the Landlord shall be deemed cured.

UTILITIES:

Art. 22. The Tenant agrees to pay for all public and private utility services furnished to the Tenant, during the term hereof, including heat, water, sewer, gas and electricity, together with all taxes, levies or other charges on such utility services.

NO WAIVER:

Art. 23. No waiver of any covenant or condition or the breach of any covenant or condition of this lease shall be taken to constitute a waiver of any subsequent breach of

such covenant or condition nor to justify or authorize the non-observance on any other occasion of the same or of any other covenant or condition thereof, nor shall the acceptance of rent by the Landlord at any time when the Tenant is in default under any covenant or condition hereof be construed as a waiver of such default.

PARKING:

Art. 24. The Landlord hereby grants to Tenant and Tenant's invitees the right, during the term thereof, to use in common with others entitled to the use thereof, the Center's parking areas. Landlord agrees to maintain such areas in good condition and to be responsible for the cleaning and prompt snow removal of same at its own expense.

DEFAULT:

Art. 25. If any installment of rent shall be in arrears and unpaid after written demand or if the Tenant defaults in the performance of any of the other covenants, terms, conditions or provisions of this lease, or if Tenant shall abandon or vacate the demised premises, or shall make an assignment for the benefit of creditors, or if the interest of the Tenant in the demised premises shall be sold under execution or other process of law, or if the Tenant shall be adjudged a bankrupt or if a receiver or trustee shall be appointed for the Tenant by any Court, and, after written notice from the Landlord, Tenant fails to cure any rent default, then the Landlord may terminate this Lease and all rights of Tenant hereunder, by giving Tenant notice in writing of the election of Landlord to do so, and Tenant shall then quit and surrender the Premises to Landlord. If this Lease shall have been so terminated by Landlord, Landlord may at any time thereafter resume possession of the Premises by any lawful means and remove Tenant or other occupants and their effects. Tenant agrees that in the event of such termination, Tenant will indemnify the Landlord against all unavoidable loss of rent and expense of

releting, which the Landlord may incur by reason of such termination for the remainder of the unexpired term of this lease. Such rights shall be in addition to any other rights or remedies of the Landlord provided in law or equity.

OBLIGATIONS OF SUCCESSORS:

Art. 26. Landlord and Tenant agree that all the provisions hereof are to be construed as covenants and agreements as thought the words importing such covenants and agreements were used in each separate paragraph hereof, and that all of the provisions hereof shall bind and inure to the benefit of the parties hereto and that their heirs or their successors and assigns.

SERVICES:

Art. 27. Whenever in this lease it be required or permitted that notice or demand be given or served by either party to this lease or on the other, such notice or demand shall be given or served and shall not be deemed to have been duly given or served unless in writing and forwarded by certified or registered mail, addressed as follows:

TO THE LANDLORD: Toa Enterprises, Inc.
4905 Klingle St. N.W.
Washington, D.C. 20018

TO THE TENANT: Mr. Johnny Jones, President
Cross Roads Books, Inc.
5898 Leesburg Pike
Falls Church, Va.

Such addresses may be changed from time to time by either party by serving notices as above provided.

PRONOUNS:

Art. 28. Personal pronouns shall include male and female, singular and plural, corporation, partnership or individual, as may fit the particular parties and the context. This lease

contains the entire agreement of the Parties, and no representation, inducements, promises or agreements, oral or otherwise not embodied herein, shall be of any force or effect.

SECURITY DEPOSIT:

Art. 29. Tenant, concurrently with the execution of this lease has deposited with the Landlord the sum of Six Hundred only ($600.00) dollars, receipt of which is hereby acknowledged, sum which shall be held by the Landlord as collateral security for the payment of any rentals and other sums of money for which Tenant shall become liable to Landlord under this lease, and for the faithful performance by Tenant of all other covenants and agreements made herein; said deposit t be returned to Tenant fifteen days after termination of this lease, provided Tenant shall have made all such payments and performed all such covenants and agreements.

IN WITNESS WHEREOF, the Landlord and Tenant have caused this lease to be signed as of the day and year first above written.

LANDLORD:

Toa Enterprises, Inc.

/s/ Lila L. Dominguez,
President

TENANT:

Cross Roads Books, Inc.

/s/ Johny Jones,
President

In consideration of the sum of one ($1.00) dollar in hand paid, receipt of which is hereby acknowledged, and in consideration of Landlord's making the foregoing Lease, the undersigned guarantees the payment by the Lessee of the rent fixed in the foregoing lease at the times therein specified and the performance by the Lessee of all the terms and conditions of the said Lease. The undersigned expressly waives notice of all defaults by the Lessee.

/s/ Dennis Pryba
11906 Bion Drive
Oxon Hill, Md. 30022

APPENDIX C

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

FAIRFAX, VIRGINIA
September 22, 1976

TOA ENTERPRISES, INC.,

v.

CROSSROADS BOOKS, INC.

In Chancery No. 48925

HEARING IN THE CIRCUIT COURT FOR FAIRFAX COUNTY, VIRGINIA

(Before the Honorable James Keith, Judge)

(T. 3) **PROCEEDINGS**

(The Court) TOA Enterprises, Inc. versus Crossroads Books; are you ready?

(Mr. Morris) Yes, Your Honor.

(Mr. Marin) Yes, Your Honor.

(The Court) Who is going to testify?

(Mr. Marin) I am going to have Mrs. Dominguez, Mrs. Clore, Mr. Findley, and Mr. Sutherland, Mr. McNichol, Mr. Craven.

(The Court) Are they all here?

(Mr. Marin) Yes, Your Honor, they are.

(The Court) Stand to be sworn.

(Whereupon, seven witnesses were sworn.)

(The Court) Do you want them excluded, Mr. Morris?

(Mr. Morris) Yes, Your Honor.

(The Court) All those who are going to testify except for whoever is the representative of TOA Enterprises, Inc., will have to stay out of the courtroom. While you are outside, don't discuss the case and don't let anybody discuss it with you.

You are not testifying?

(Mr. Marin) No, she is not.

(The Court) What is your ground for equitable relief (T. 4) Mr. Marin?

(Mr. Marin) Your Honor, the ground for equitable relief is fraud in the procurement of a lease agreement from Mrs. Dominguez who is the president and stockholder of TOA Enterprises, the landlord.

(The Court) What is the fraud?

(Mr. Marin) The fraud is a representation made to Mrs. Dominguez at the time the lease was being discussed and negotiated and prior to its execution. A certain Mr. Pryva, acting as agent for the defendant, Crossroads Bookstore, stated to Mrs. Dominguez that they were going to use the premises as a family book store and use it to sell school supplies to children.

In fact, there are no school supplies available, no school supplies being sold to children, no text books and it certainly is not a family book store.

Secondarily, or secondly, there have been several convictions of personnel located on those premises who have been charged with selling pornography and there have been convictions.

Mr. Sands was convicted twice, two felonies; and there have been others who were subsequently convicted for selling material, books, films or whatever which is in (T. 5) violation of the lease and the lease provisions as stated in Count 3.

(The Court) What is the lease provision?

(Mr. Marin) The lease provision insofar as using the premises in a lawful manner as contained in paragraph 11 –

(The Court) All right.

(Mr. Marin) And paragraph 4.

As a preliminary matter, Your Honor, I would like to make a motion at the appropriate time to dismiss the counterclaim filed by the defendant on the grounds that it is not a Virginia corporation nor is it a foreign corporation authorized to transact business in the State of Virginia. And under the code, they are not permitted to maintain an action.

I am relying on Section 13.1, Section 281. It is an affirmative defense set up in my answer to the counterclaim and I would ask Your Honor to take judicial notice of a statement made by the State Corporation Commission under seal that Crossroads Books, Inc., the tenant under the lease, is not the name of any corporation existing under the laws of Virginia or of a foreign corporation holding a certificate of authority to transact business in Virginia.

Accordingly, they shall not be permitted to maintain (T. 6) any action; and on those grounds, Your Honor, I respectfully request that the counterclaim be dismissed.

(The Court) Well, I take it there was a second counter-claim filed after the crossbill filed after the first one was. Is that more or less the stage of it?

(Mr. Marin) That is correct, Your Honor. There was an amended crossbill filed and an amended answer, and I as an affirmative defense in my answer raised the prohibition –

(The Court) Are you ready to go?

(Mr. Marin) Yes, Your Honor, I am.

(The Court) All right. Do you want to call your first witness.

(Mr. Marin) As my first witness, I would like to call Mrs. Dominguez.

Will you please take the stand.

(Mr. Morris) Did Your Honor indicate that you want the witness to sit there or here?

(The Court) Right there. I can't see or hear you. Sit there (indicating).

Whereupon,

LENA DOMINGUEZ

was called as a witness by and on behalf of the complainant, and, having been previously duly sworn, was examined and testified as follows:

(T. 7) **DIRECT EXAMINATION**

By Mr. Marin:

Q. Mrs. Dominguez, would you please state your full name. A. Lena Dominguez.

Q. And what is your relationship to TOA Enterprises, Inc.? A. I am president of the corporation that owns the shopping center.

Q. Would you tell the court what the relationship between the corporation and certain premises known as the Glen Forest shopping center is. A. The corporation owns the shopping center.

Q. And would you please state the street address of the shopping center. A. I have them in my papers.

(Mr. Morris) I stipulate for the purposes of clarity, Your Honor, it is located in the Bailey's Crossroads area of the county.

(The Witness) Route 7, Bailey's Crossroads.

(Mr. Morris) And it is the subject matter of this lawsuit.

(Mr. Marin) It has also been tendered as Exhibit 1 –

(T. 8) (Mr. Morris) As to the lease, I stipulate that is the lease.

(Mr. Marin) The address is 5898 through and including 5918 Leesburg Pike of Falls Church, Virginia.

(Mr. Morris) If the court please, I stipulate that is what it is.

Q. (By Mr. Marin) In your capacity as president of the corporation, did you have occasion to negotiate and enter into leases for the shopping center? A. Yes, I have negotiated the leases before.

Q. Are you familiar with a Dennis Pryva? A. Yes. I have talked over the phone with Mr. Pryva and met with him personally before signing this lease.

Q. We haven't gotten to that. Could you state for us approximately when you met Mr. Pryva and what you discussed with him. A. Well, sometime in September, he called me and told me that he was interested in –

(Mr. Morris) Your Honor –

(The Court) September, what year?

(Mr. Morris) I would also object to any testimony with reference to Mr. Pryva until the proper foundation is (T. 9) laid that he in fact had the authority to negotiate a lease.

And furthermore, the lease will speak for itself. It seems to me that what they are trying to attempt to do is get into a collateral issue that they obviously cannot get into on a direct issue. And if Mr. Pryva was an officer of the corporation or if she has some documentation that shows he had the authority to change the written terms of the lease, I would have no objection to it.

But that is not the case, as I understand it. And I would object to any reference to Mr. Pryva and the Crossroads Books' lease.

(The Court) Well, who signed the lease?

(Mr. Morris) The president of Crossroads Books which is not Mr. Pryva. And Mr. Pryva did, in fact, at the request of Mrs. Dominguez, guarantee it as an individual.

(The Witness) I would like to explain that, Mr. Morris.

(Mr. Marin) Your Honor –

(The Court) Well, have you got any documents showing his connection with the corporation?

(Mr. Marin) Your Honor, Mr. Pryva was the one that negotiated the lease and made the representations. As to whether or not he had the authority is quite immaterial. He (T. 10) is the one that induced Mrs. Dominguez to execute the lease and he is the one that made the false representations. I rely on Packard Norfolk versus Miller, 198 Va. 557, and also White Sewing Machine Company versus Gilmore Furniture, 128 Va. 630.

When an agent, with or without authority, induces someone to execute a contract –

(The Court) All Mr. Morris wants you to do is prove he was the agent of the corporation.

(Mr. Marin) He is the one that induced Mrs. Dominguez to sign the lease.

(The Court) You go ahead. Who were the agents?

Q. (By Mr. Marin) With whom did you negotiate? A. Mr. Pryva and he signed it as a guarantor. He told me he would have somebody else sign the lease because he wanted the person who was going to be there to get some kind of a, to get interested in the shop, but that he would guarantee it.

And he was the only person I did talk about in reference to this lease.

Q. I show you this document –

(Mr. Morris) With your permission, without (T. 11) interrupting every time, would the court please accept a continuing objection then to any references to Mr. Pryva. Therefore, I won't have to object every time.

(The Court) You better object every time. Because I don't know who Mr. Pryva is.

(Mr. Morris) Then I would object again to the allegation that Mr. Pryva had the authority to negotiate this lease.

(The Court) We are not talking about authority now. I am talking about who he is.

(Mr. Morris) Then I would object to any reference to Mr. Pryva's having a part, implied, expressed or otherwise, any authority to commit a corporation to anything other than the written terms of the lease.

(The Court) All right.

(The Court) All right.

Q. (By Mr. Marin) Mrs. Dominquez, I hand to you a plaintiff exhibit number 1 which is entitled "Lease Agreement" for identification; would you please state the nature of this document?

(Mr. Morris) Your Honor, the document will speak for itself. That is the lease.

(The Court) It will speak for itself.

(Mr. Marin) All right. Fine.

(T. 12) Q. (By Mr. Marin) Mrs. Dominguez, I show you the last page of this document. Is that your signature? A. That is my signature and that is the guarantee that Mr. Pryva signed for.

Q. All right. Now, with whom did you negotiate this lease, Mrs. Dominguez? A. Only with Mr. Pryva.

Q. And would you please tell this court on what occasions you met with Mr. Pryva and how many times – how many times did you meet with Mr. Pryva? A. I talked over the phone with him. I did talk with his wife on several occasions. And then I met personally with Mr. Pryva at the location.

Q. My question was how many times did you meet him? Once, twice? A. Personally, once.

Q. Personally, once. At that time, did you discuss the possibilities of leasing space in the Glen Forest Shopping Center? A. Yes, I did.

Q. What was the nature of your discussions with Mr. Pryva?

(T. 13) (Mr. Morris) Objection, Your Honor.

(The Court) Overruled.

(Mr. Morris) The ground being, if Your Honor please, they still haven't shown Mr. Pryva as being –

(The Court) I hope that is where they are going, Mr. Morris.

(The Witness) I met Mr. Pryva even though I was in a very difficult situation at the time because my husband was very ill, I made a trip to the shopping center to meet with him personally because I wanted to make sure that I was getting a family-type bookstore. And I made it very clear to him and with the schools around.

(The Court) Before we get into that, who was Mr. Pryva?

(The Witness) Mr. Pryva represented himself to me as the person that was going to rent the shop there.

(The Court) You were going to rent it to him?

(The Witness) Yes.

(The Court) All right. As an individual?

(The Witness) As an individual.

(The Court) All right. Go ahead.

(The Witness) And I met with him at the place and I told him that I had come expressly to talk with him (T. 14) personally because I was interested in having a family-type bookstore there. I mentioned the different schools around and that I did not want any pornography type of bookstore.

(The Court) What made you think it was going to be a pornography store?

(The Witness) I don't know why, sir. But I was – somehow I felt that I had to make this clear.

(The Court) Had you had one before?

(The Witness) No, I have never had any.

(The Court) What made you think you were going to have one this time.

(The Witness) I have no idea why I –

(The Court) Were there any others in the shopping center?

(The Witness) No. I left my home with that precise thought in my mind.

(The Court) All right. You wanted a family bookstore. Go ahead.

(The Witness) And he assured me that that was the kind of bookstore he was going to put up and he said that he would like

to put in it other related materials like pencils and pens and notebooks and that type of thing.

We talked for about half an hour about what kind (T. 15) of a bookstore, the neighborhood and the different schools around. And that was it.

(The Court) All right. Next question.

Q. (By Mr. Marin) After you had this discussion with Mr. Pryva as to the use of the premises as a family-type bookstore selling supplies and things to children at the school, what happened then, what followed your conversation with Mr. Pryva? A. I did, I had a phone call from Mrs. Pryva at the time asking me if I could –

(Mr. Morris) I object to that. That is really getting far afield.

(The Court) You can't tell what Mrs. Pryva said.

(Mr. Morris) Now we are talking about Mrs. Pryva –

(The Court) I say you can't tell what Mrs. Pryva said.

(The Witness) Well, we had discussions.

(The Court) As a result of the discussions, what happened?

(The Witness) I did reduce the rent we had already put in the lease and we reduced the rent from 650 to 600.

Q. (By Mr. Marin) And when was it that the lease was actually signed? (T. 16) Could you tell us about that? A. The date?

Q. No, when did you sign the lease? When did Mr. Pryva sign it? Was it in your presence? A. No, it was not in my pres-

ence; at the time my husband was very ill, and he sent somebody to get the lease in my home. He took the lease over to –

(The Court) Did you have the lease prepared?

(The Witness) Yes.

(The Court) And did he tell you that Crossroads Books was to be the lessee?

(The Witness) He told me it was his bookstore, that he had other bookstores.

(The Court) Well, who did you go to to have the lease prepared?

(The Witness) I had it at home, sir.

(The Court) You did it yourself?

(The Witness) Yes.

(The Court) And who told you that Crossroads Bookstore was to be the lessee?

(The Witness) They called me over the phone. It was Mrs. Pryva who called me over the phone and gave me that reference.

(T. 17) (The Court) What did Mr. Pryva say?

(The Witness) That that was the, that was his organization.

(The Court) Did you make any notes? Did you make any notes as to who the lease would be, how long it was to be, anything of that sort?

(The Witness) Yes. I did.

(The Court) Where are your notes?

(The Witness) At home.

(The Court) And he told you he was acting for Crossroads Bookstore?

(The Witness) Yes, sir.

(The Court) All right. Your objection is overruled, Mr. Morris.

(Mr. Morris) Yes, Your Honor. Note my exception for the grounds stated when the objection was made, please.

(The Court) I think it has been established he was acting as agent for the Crossroads Bookstore.

Q. (By Mr. Marin) Now, Mrs. Dominguez, did you sign the lease and hand it to Mr. Pryva or did Mr. Pryva take the blank lease and then get it signed and bring it back to you? Just when and where and how was the lease signed? (T. 18) A. I gave the lease to a gentleman that told me he was a CPA for the father of Mrs. Pryva; that he was to expedite things that these people –

(The Court) Just tell us what you did, not what everybody said. You prepared the lease and handed it to somebody who said he was a CPA.

(The Witness) That took it to Mr. Pryva.

(The Court) When did you see it next?

(The Witness) When it was returned to me.

(The Court) By whom?

(The Witness) By this same person.

(The Court) And you never saw it signed?

(The Witness) No, it was not signed in front of me.

(The Court) All right.

Q. (By Mr. Marin) When the lease was then returend to you with the signature on it, did you at that time sign the lease? A. Yes.

Q. Is this a copy of that lease, Mrs. Dominguez? A. Yes, it is.

(Mr. Marin) If there are no objections, Your Honor, I would like to introduce the lease as an exhibit.

(The Court) All right. Any objection?

(T. 19) (Mr. Morris) No objections to the lease.

(The Court) All right. Plaintiff's Exhibit Number 1.

(The document previously referred to was marked Complainant's Exhibit No. 1 for identification and received in evidence.)

(The Court) All right.

Q. (By Mr. Marin) There did come a time, Mrs. Dominguez, did there not, when the premises were occupied by people who you believe signed the lease, Mr. Pryva, or –

(The Court) Who was it. You don't have to say – who did move in?

(The Witness) Well, they took about ten or fifteen days to open the store. And when it was opened, people from the neighborhood called my home.

(The Court) You can't tell what they said. The store opened in fifteen days. And who moved into this – did you ever see anybody in the store?

(The Witness) No, I did nothing over there. I had a call first from neighbors saying –

(The Court) How do you know that Crossroads Bookstore (T. 20) ever moved in?

(The Witness) Well, they were moving in –

(The Court) How do you know they were?

(The Witness) I personally didn't go there, sir, because my husband was very ill and he died five or six days after this was opened.

But my children had been there and they said –

(The Court) You can't tell what your children said.

(The Witness) They are moving, that the store was moving in.

(The Court) All right.

Q. (By Mr. Marin) Did you ever visit the store? Did you ever go into the store? A. I did.

Q. When did you go into the store? A. I went to the store a couple of months ago.

(The Court) Do you admit that you moved in?

(Mr. Morris) I admit that the, yes, Your Honor, I admit that the corporation did in fact move in.

(The Court) All right.

Q. (By Mr. Marin) Did you ever receive phone calls from anybody in (T. 21) connection with the store?

(Mr. Morris) Your Honor, that is not at all admissible.

(The Court) Just say yes or no. That's all.

(The Witness) Yes, I did.

(The Court) All right.

Q. (By Mr. Marin) As a result of those phone calls, what did you do?

(Mr. Marin) Your Honor, I would like to show what the phone calls were that –

(The Court) Sorry, I can't help you. It would be hearsay.

(Mr. Marin) Well, it caused her to act, Your Honor.

(The Court) All right. You have asked her the question, as a result of the phone calls, what did she do. She can answer that.

Q. (By Mr. Marin) Mrs. Dominguez, as a result of these phone calls, what did you do? A. Well, the first thing that I thought I should do was call the police and see, you know, what I could do. And –

Q. Well, at least find out what was going on. A. To know what, you know, what –

(T. 22) (The Court) All right. You called the police.

(The Witness) Yes. I also called Mr. Pryva.

Q. (By Mr. Marin) What did Mr. Pryva say to you at that time? A. Mr. Pryva did not come to the phone.

Q. Was he at home, do you know? A. I don't know. Mrs. Pryva answered the phone.

Q. And she didn't say whether or not –

(The Court) You can't say what she said.

(The Witness) I beg your pardon, sir.

(The Court) All right. You called Mr. Pryva and you didn't get him. Then what else happened?

Q. (By Mr. Marin) Did you leave a message for him to return the call? A. Yes, I left several messages.

Q. You called him more than once? A. I called him three times.

Q. Did he ever return your phone call? A. No, he didn't.

Q. Did you ever have occasion to visit the store? A. I visited not long ago.

Q. And you walked inside the store? A. I did walk inside the store.

(T. 23) Q. And what did you see? A. Well, it was a very – it is difficult to explain. It was, most of them were sex-related objects, obscene pictures.

(Mr. Morris) If Your Honor please, might I object to the terminology. I think it is –

(The Court) All right. It is her terminology, so I will let her express it the way she wants to.

(Mr. Morris) As long as it is not a legal conclusion, if Your Honor please.

(The Court) All right.

(Mr. Marin) We will get to that legal conclusions later, Mr. Morris.

(The Court) Go ahead and ask her the questions. You went in the store and you saw things that to you were obscene?

(The Witness) Yes, sir.

(The Court) Go ahead.

Q. (By Mr. Marin) Did you find any textbooks or school supplies? What exactly did you find? Only – A. There were no textbrooks and there were no school supplies there.

Q. Did you speak with anybody at the store? (T. 24) A. I told the clerk who I was and told him I wanted to look at the store.

Q. Did you ever meet with Mr. Allan Sands? A. Yes, I was at the store when Mr. Sands was there.

Q. What was Mr. Sands doing? A. He didn't talk to me, he just let me look around.

(The Court) What is he? A clerk or what?

(The Witness) He is a clerk.

(Mr. Morris) He is a clerk there and he is deceased, Your Honor.

(The Court) And he is deceased?

(Mr. Morris) Yes.

Q. (By Mr. Marin) Did you ever have occasion to learn that there was some legal difficulty with the store in connection with the sale of material or supplies or whatever –

(Mr. Morris) That is objectionable, Your Honor. The only thing she could learn is by what somebody else told her. You couldn't take judicial notice.

(The Court) All right. Objection sustained.

(Mr. Morris) Thank you, Your Honor.

(Mr. Marin) There were convictions she did have knowledge of.

(T. 25) (The Court) You are going to have to prove them.

(Mr. Marin) All right, sir.

Q. (By Mr. Marin) In your opinion, Mrs. Dominguez, was the type of articles for sale in the store in accordance with your understanding –

(Mr. Morris) I object to that, Your Honor.

(The Court) Let him finish his question.

(Mr. Morris) I thought he did.

(The Court) Understanding of what?

Q. (By Mr. Marin) In accordance with your understanding of Mr. Pryva prior to the time that you were executing a lease, in accordance with the representations made by Mr. Pryva to you? Was the store used in that way as you say, a family bookstore and school supplies?

(Mr. Morris) If your Honor please –

(The Court) All right. Please state your objection.

(Mr. Morris) I object again. Here again I object to the court that the instrument is the best evidence, not what she may or may not think.

(The Court) She alleged fraud and she said she was (T. 26) induced to sign by fraud. I will let the question stand. Overruled.

(The Witness) Definitely not what the bookstore was expected to be. The material there is in no way the kind of material that the family bookstore would carry.

Q. (By Mr. Marin) If you had known at the time that you were speaking with Mr. Pryva and prior to the time you signed the lease that the bookstore would be used the way it is used now, would you have signed that lease?

(Mr. Morris) Your Honor, that is very objectionable. That is a self-serving question.

(The Court) I don't think that is a proper question. Objection sustained.

(Mr. Marin) I have no further questions of this witness, Your Honor.

(The Court) Do you want to ask any questions?

(Mr. Morris) Some questions, if Your Honor please.

CROSS-EXAMINATION

By Mr. Morris:

Q. Mrs. Dominguez, how long have you been in real estate? A. Ten years.

(T. 27) Q. You have had many leases during that ten years? A. Yes, I have.

Q. You have had some experience in communicating with potential tenants, don't you? A. Mostly communicating, not so much in writing leases as in communicating.

Q. As a matter of fact, this lease was drawn up by your lawyers, wasn't it? A. No, it was not.

Q. This lease was drawn up by you? A. That lease was drawn up by my husband.

Q. Was your husband an attorney? A. No, my husband was not an attorney.

Q. You would without hesitancy say this was a legal and binding lease, wouldn't you? A. At this point –

(Mr. Marin) Well, that is a legal question, Your Honor. It is not legally binding because it was induced by fraud. This witness can't be expected to answer a legal question.

(The Court) All right.

Q. (By Mr. Morris) Let me ask you this question. You say you were (T. 28) under the impression that it was to be a family bookstore? A. Yes.

Q. Why didn't you put that in here? A. I must say that at this point, I don't think the lease was – should have been written by a lawyer instead of my husband.

Q. You will admit that the lease was drawn up by TOA Enterprises, Inc.? A. Yes, it was drawn by my husband.

Q. It was your lease? A. Yes.

Q. And not Mr. Jones' lease, the president of Crossroads? A. No.

Q. Is that correct? A. That is correct.

Q. In that connection, Mrs. Dominguez, His Honor made an inquiry into why did you think this bookstore was going to be made into something, like what you now say it was. A. I

don't know how to answer that question. Because even when I left my home to go and meet Mr. Pryva, I talked with my daughters that I was going to question him and they thought, well – and I found myself feeling funny about asking (T. 29) that question. But for some reason I wanted to be careful. I don't know why. I wanted to be careful to make sure that it was a family-type bookstore.

Q. Notwithstanding that very strong impression you had, you still did not insert it into the written agreement? A. No I didn't. That was – that was missing.

Q. Did you ever talk to Mr. Jones as to the president? A. No, I never talked to Mr. Jones.

Q. So what – then the only time Mr. Jones presumably agreed to anything was what he agreed to in the written lease? A. I beg your pardon.

Q. Mr. Jones, the president of Crossroads Books, Inc., had, when he signed this lease as president of the corporation, he signed it based on the written terms, did he not? A. Well –

(Mr. Marin) Object, Your Honor.

(The Court) Don't object to him. What is your objection?

(Mr. Marin) Mrs. Dominguez couldn't know what is in Mr. Jones' mind.

(The Court) You object on what grounds?

(Mr. Marin) On the grounds of incompetency; the witness is not competent to answer that question.

(T. 30) (The Court) Let her be the judge of that.

Q. By Mr. Morris) Would you answer the question, Mrs. Dominguez. A. Well, my understanding with Mr. Pryva was that

Mr. Jones was just a person put in there to give him more incentive. Those were the words he used; to work harder in the bookstore.

So I, you know, didn't –

Q. It was a bookstore. Is that what Mr. Pryva told you, a bookstore? A. No, I referred to the family bookstore.

Q. Have you received the monthly rent every month? A. Yes, I have.

Q. Who has been signing the checks? A. Mr. Jones, I believe.

Q. President of Crossroads Books? A. Yes.

Q. Mrs. Dominguez, the first time that you became aware of the nature of the bookstore according to your understanding, you say you called the police. A. Yes.

Q. As a matter of fact, you sent them a registered letter long before that, didn't you? (T. 31) A. After I called them.

Q. After you called who? A. Yes.

Q. Who? A. I called the, one of my daughters, as a matter of fact, I was not, I was not told that it was a pornographic bookstore because it was just three days before my husband died that the bookstore was opened. So my duaghters were the ones who took the neighborhood calls and community calls and one of them did write a letter. I talked with the police.

Q. My inquiry to you is, didn't you write a letter? A. Yes.

Q. And is there any reason why you did not mention the nature of the bookstore in your very first communiccations with the bookstore.

The very first time you communicated with them, you sent them a registered letter. A. To the bookstore?

Q. Yes. I will show you that and see if you can identify it.

(Counsel handing document to the witness.)

Is that your letter on your letterhead? A. Yes.

(T. 32) Q. Is that your signature on the bottom? A. Yes, it is.

Q. Would you tell His Honor, Mrs. Dominguez, why you did not mention the nature of the bookstore? A. I was trying to see how I could get the bookstore out.

Q. As a matter of fact, you never required them to do anything, did you?

(The Court) Never what?

(Mr. Morris) Required the bookstore to do anything other than pay the rent.

(The Witness) No, we tried to, I tried to talk with, tried to talk to Mr. Pryva to see if we could do something about that.

Q. (By Mr. Morris) Might I inquire then, Mrs. Dominguez, in that registered letter you sent to the Crossroads Bookstore, Incorporated, why you did not mention that the store was selling items inconsistent with your understanding? A. This, I thought this was a way of trying to get them out because they would be doing something illegal. Maybe the wording is not the correct one.

Q. Well, is it incorrect to say that the items you are (T. 33) selling are pornographic and therefore leave; wouldn't that be the most appropriate thing to say? A. Maybe I didn't use the right word. What I was trying was to get them out.

So I felt that that way, I could get them somehow –

(Mr. Morris) If Your Honor please, might I introduce that?

(The Court) The letter dated October 2, 1975, defendant's Number 1.

(The document previously referred to was marked Defendant's Exhibit No. 1 for identification and received in evidence.)

(Mr. Morris) Thank you.

Q. (By Mr. Morris) Mrs. Dominguez, as a matter of fact, that letter that you wrote complains about nothing more than what you thought were exterior signs, is that not true? A. Uh hum.

Q. And when in fact, there were no exterior signs? A. Yes, it was a lack of knowledge of the kind of wording that I should have used. I have noticed in the letter that you wrote me, saying that the signs were interior, (T. 34) I thought that those signs were signs –

Q. Let me ask you the question. Mrs. Dominguez, you had ten years in the experience of negotiating leases. A. Well, I have not negotiated the leases myself. My husband always did that. I –

Q. What is the nature of TOA Enterprises, what is their primary function? Are they property owners and managers? A. Yes.

Q. You are the president of that corporation? A. Yes.

Q. And you do have some knowledge of the intricacies of lease negotiations, don't you. A. To a certain extent. Before my husband died, he did most of the – this is exactly the first time that I had to deal directly with that.

Q. How long have you been president of TOA? A. Oh, for some years.

Q. Are you also on the board of directors? A. Yes, I am.

Q. And do you go to the board of directors' meetings? A. Yes.

Q. Stockholders meetings? A. Yes.

(T. 35) Q. You are the chief executive officer? A. Yes, I am.

Q. And the company that you are the chief executive officer of, does in fact primarily deal in leasing and property management, is that correct? A. That is correct. But during my husband's life he was the one that dealt with lease matters.

Q. Might I inquire of you, when this lease was signed by the president of Crossroads Books, Incorporated, were you not having some problems with the shopping center as to vacancies? And as a matter of fact, was that the biggest vacant store there? A. Yes. As a matter of fact, there was a vacant store. But this is –

Q. And there was one at the other end too, wasn't there? A. This is the very smallest part of the shopping center.

Q. There was another store at the other end that was vacant? A. There was one store vacant, one.

Q. And you were anxious to rent this? A. That was the smallest part. I wanted to rent the large store but this is a very small part.

(T. 36) Q. During that period of time, you were anxious to get a tenant? A. Not for this one. I have three or four tenants –

Q. How long was that store vacant? A. The little one?

Q. Yes. A. Oh, about fifteen days or ten days.

Q. And the big one, that was creating an expense; how long was that vacant? A. Just that same month.

Q. Safeway? A. Safeway wasn't there. Safeway had left before. There was Sun Radio in the same months, in September, just before I rented this one, and after I rented to this one. They left. But it was all rented at the time.

Q. Can you present to His Honor any evidence, documented, that would tell you that Mr. Pryva had the authority to bind anybody other than himself individually? A. I don't have any written letter. I met Mr. Pryva who impressed me like a very clean-cut young American business man.

Q. All right. A. And I believed him.

(T. 37) Q. Then if you believed him, why did you want him to guarantee the lease? A. Well, because he was not signing it and I wanted his name in the lease.

You know, he told me Mr. Jones would sign it because he wanted to give him some incentive. So that he would –

Q. Johnny Jones never told you what he was going to do with the premises other than what the lease called for? A. I never talked with Mr. Johnny Jones.

Q. But he is the one that signed the lease.

(Mr. Marin) She answered the question. She never spoke with Mr. Jones.

(The Court) Let's get something straight. I don't want any colloguys between you all. If you have anything to say, you talk to me.

(Mr. Marin) I apologize, Your Honor.

(The Court) All right.

Q. (By Mr. Morris) Mrs. Dominguez, then your answer to my inquiry is that you never even conferred with Mr. Jones? A. No, I didn't.

Q. The president of the – who was the tenant? (T. 38) A. I just believed what Mr. Pryva said.

Q. Is there any reason you didn't communicate with Crossroads Books who was the tenant or Mr. Pryva who was the individual who guaranteed the lease at your request, why you never wrote to them and said this is not what you and I agreed upon? Is there any reason you never did that? A. I tried to talk with him on the phone on three occasions. And the kind of answer I did get on one occasion from Mrs. Pryva just made me believe that I was not, I was not going to get anyplace as far as getting the store out.

Q. Based on your experience in this type of business, you do know a person is bound by the terms of the lease, you know that, don't you? A. I know that, except up to that moment, I had never been the person that dealt with the leases. It was always my husband who did it.

Q. Why did you continue to accept the monthly rental if they were in violation of the lease, according to you? A. Well, it was rented and I had to – I talked to my lawyer and he said that it wouldn't make any difference.

Q. To take the money, is that right? A. That is right.

(Mr. Morris) I have no other questions.

(T. 39) (The Court) Let me ask you, article 25 of the lease on the – provided for written notices. Did you ever give them written notice?

(The Witness) No.

(Mr. Marin) Your Honor –

(The Court) How are you going to – all right. You want to ask any redirect?

(Mr. Marin) Yes.

REDIRECT EXAMINATION

By Mr. Marin:

Q. Mrs. Dominguez, did you subsequently hire counsel to represent you in this matter? A. Yes, I did.

(Mr. Morris) That is going beyond the scope of cross.

(The Court) I will let him go back. You can reexamine on that.

(Mr. Marin) He is talking about why she didn't have counsel and notice was given by her dated November 6th.

(The Court) I just asked if she gave any notice. She said no, sir. You are supposed to be proving the case; not me.

(T. 40) Q. (By Mr. Marin) Did you cause a letter to be written dated November 6, 1975, which is Exhibit 2. A. Yes, I –

Q. Written on your behalf by your attorney? A. Yes. I felt that I couldn't manage this myself unless I decided that I better get an attorney to take care of this thing.

(The Court) Plaintiff's Number 2.

(The document previously referred to was marked Complainant's Exhibit No. 2 for identification and received in evidence.)

Q. (By Mr. Marin) Now, is it your testimony, Mrs. Dominguez, that this letter was written with your knowledge and consent and expresses your wishes in the matter in connection with the controversy between you and Crossroads Books? A. Yes. This is the letter that I requested my lawyer to take over and was the letter written at the moment.

(Mr. Marin) I have no further questions, Your Honor.

(Mr. Morris) One or two, with Your Honor's permission.

(T. 41) **RECROSS EXAMINATION**

By Mr. Morris:

Q. This is your attorney's words, not yours? A. I didn't feel I was competent to handle this.

(The Court) Is this what we have got here? The letter of November 6th is yours?

(Mr. Marin) Yes, Your Honor.

(The Court) It has been admitted as Plaintiff's Exhibit Number 2.

Q. (By Mr. Morris) Is that your answer; that you didn't feel competent? A. I didn't feel competent to handle this kind of problem at the moment.

Q. Tell me, Mrs. Dominguez, how many leases do you have outstanding right now or your corporation? A. Well, we have several but after my husband died, I always consult with a lawyer before – before he used to do this work himself but I don't do it myself.

Q. How many leases did you have outstanding at the time this lease was signed? Did you have fifty or a hundred? A. Not that many.

Q. How many? A. Oh, we had about, I think altogether, thirteen.

(T. 42) (The Court) I am not hearing you. She said twenty?

(Mr. Morris) Thirteen.

(The Witness) Thirteen.

Q. (By Mr. Morris) Thirteen leases. Are these with some national tenants or international tenants? A. At the moment, I don't have any national tenants.

Q. But you have large tenants, substantial, is that correct? A. I have one national at that shopping center.

Q. Did you use the same lease as you did in this case? A. No, that tenant came after my husband died and I got a lawyer to write it down.

Q. Which tenant was that? A. Mazor's.

Q. They were there how long? A. Oh, about, about the same time that the, that my husband died, about the same time that the bookstore came in.

Q. For some reason, you had that tenant, you went to a lawyer to have that lease prepared. A. Yes.

(Mr. Morris) No further questions.

(The Court) Who is your next witness.

(T. 43) (Mr. Marin) Thank you, Mrs. Dominguez.

(Witness excused.)

(Mr. Marin) I would like to call Detective Sutherland, Your Honor, of the Fairfax County Police Department.

Whereupon,

JESSEE C. SUTHERLAND

was called as a witness by and on behalf of the Complainant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marin:

Q. Detective Sutherland, would you please state your full name and occupation. A. My name is Jessee C. Sutherland, member of the Fairfax County Police Department.

Q. Are you familiar with the premises known as 5898 Leesburg Pike? A. Yes, sir, I am.

Q. In what connection did you become familiar with these premises? A. We became involved in the case in 1975, in October of 1975. At that time, my partner, Steve Craven, and I (T. 44) entered the store. It was an adult bookstore, Crossroads Books, Incorporated.

Q. Did you visit the premises? A. Yes, we did.

Q. And what were your actions subsequent to your visit of the premises? A. I purchased a film from an employee within the premises of the store.

Q. And what was the name of that film? A. The title was "Succulent Housewife."

Q. After you purchased the film, what did you do next? A. I took the film by the special magistrate's home and whereupon

he viewed the film and said he had probable cause to believe, that he believed the film to be obscene and the defendant in the case was ultimately arrested.

(The Court) Who was the defendant?

(The Witness) Allan R. Sands. Was ultimately –

(The Court) Was he a clerk in the store?

(The Witness) Yes, he was.

(Mr. Morris) For the sake of brevity, might I suggest to the court that that case has never been finalized. The records of the court will reflect that.

To save some time, Judge Plummer was the presiding (T. 45) judge and prior to that hearing the particular person committed suicide and prior to that time he had not been sentenced.

So in that connection, I would respectfully suggest to the court, if that is the purpose of introducing this evidence to show a conviction of a criminal offense, obviously that is not the case because he has never been sentenced.

(Mr. Marin) Your Honor, I have here a true bill returned by the –

(Mr. Morris) Grand Jury.

(Mr. Marin) – jury.

(The Court) There ought to be an order.

(Mr. Marin) Yes, there is an order.

(The Court) Let's see it.

(Mr. Marin) "We, the jury, on the issue joined in the case of Commonwealth –"

(Counsel handing document to the Judge.)

(The Court) Looks like it is filed to me.

(Mr. Morris) On the day, if I might, please, on the day he was to be sentenced – I don't think you will find an order filed by a judge imposing that sentence. In fact, there were motions to be argued on the day Mr. Sands committed (T. 46) suicide to set that verdict aside.

(The Court) "Thereupon, it was demanded of him, Allan R. Sands, if anything he knew or did to say why the court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is adjudged and ordered that Allan R. Sands to serve twelve months in jail."

(Mr. Morris) Who signed that?

(The Court) Judge Plummer. There it is and that is the record submitted into evidence as Plaintiff's Exhibit Number 3.

(The document previously referred to was marked Complainant's Exhibit No. 3 for identification and received in evidence.)

(Mr. Morris) Might I suggest, Your Honor, on the day that Mr. Sands was to be sentenced, he committed suicide and that is part of the record if that is the case.

(The Court) I can't help you any. This is the record, certified, a copy attested. I won't let you dispute it.

(Mr. Morris) You will not let me dispute it?

(The Court) Unless you give me a record to dispute (T. 47) it or call the clerk to say it is not correct.

(Mr. Morris) I will have to call the clerk and bring the whole file down.

(The Court) All right. That is admitted, Plaintiff's Number 3.

(Mr. Morris) I would like to have an opportunity then to call the clerk to refute that when I put on my case.

(Mr. Marin) I would also like to introduce other exhibits, Your Honor. I can go through the questions if Mr. Morris has no objections.

(Mr. Morris) Unless it is a full record, I have –

(Mr. Marin) It is the arrest warrant. I thought maybe I might save some time. It is the order for preliminary hearing, the indictment, and the investigation report.

Do you have any objections to it?

(Mr. Morris) I have no objections to the documents for what they are worth, Your Honor. They certainly don't show convictions.

(The Court) All right. These will all be a part of this.

(Mr. Marin) Yes, Your Honor. I am sorry that has no staple on it.

(The Court) All right.

(T. 48) (Mr. Morris) With Your Honor's permission, may I see Judge Plummer's judgment order?

The only comment I would make if I might, without being out of turn, you will note Judge Plummer's order, execution of sentence in this case, was continued and never imposed. So there is in fact no –

(The Court) It doesn't mean it wasn't imposed. It means it wasn't executed.

(Mr. Morris) It was actually suspended.

(The Court) The execution was suspended pending an appeal.

(Mr. Morris) Post-trial motions is what the order says.

(The Court) Whatever it is. He was sentenced and it is a final order as far as the sentence is concerned unless you can show where it was set aside.

I am going to admit it to show the guilt. Wait a minute now. This is yours.

(Mr. Morris) Thank you, sir.

Q. (By Mr. Marin) Detective Sutherland, did you have any further occasion to visit the store? A. Yes, sir, I visited the store several times after (T. 49) that; the latest, one of the latest being on April the 7th, 1976; whereupon I visited the store again, and again, a different clerk by the name of Timothy Griffith was working there. On the 7th I purchased a magazine–

(The Court) I mean, I have got some questions about this. The notice to vacate was given on the 6th of November or December; we are not interested in anything that happened after that, are we?

(Mr. Marin) They filed –

(The Court) If you want to interfere, I don't know. But you gave notice to vacate for violation of paragraph 11 on the 6th of November.

(Mr. Marin) And they filed to vacate.

(The Court) Sir.

(Mr. Marin) They filed to vacate the premises.

(The Court) That is why we are here.

(Mr. Marin) And they are continuing in the same type of illegal operations that they have at the time the notice was written.

(The Court) Well, if you are not objecting, Mr. Morris, I don't mind hearing it.

(Mr. Morris) Well, if Your Honor please, I do make objection.

(T. 50) (The Court) I don't think it is material.

(Mr. Marin) I just have one question, Your Honor.

(The Court) All right.

Q. (By Mr. Marin) On your subsequent visits to the store, was the same, in your opinion, was the same type of material being sold as was sold at the time you bought the film?

(Mr. Morris) I object to that. That calls for a legal conclusion.

(Mr. Marin) The same type of material is –

(The Court) I don't think it is legal. I will let him answer the question. Your objection is overruled.

(The Witness) The books and magazines were the same. There were no films for sale on my second visit there.

(Mr. Marin) I have no further questions for him.

CROSS EXAMINATION

By Mr. Morris:

Q. Detective Sutherland, are you also aware of the fact that your trials emanating from that same activity in which the clerk was found not guilty – in their other trials?

(The Court) That Griffith –

(Mr. Morris) Griffith was dismissed. He pleaded guilty and subsequently dismissed. I don't want to take (T. 51) advantage of that for obvious reasons. But I am talking about other jury trials involving the same material in which there were acquittals.

(The Witness) Do you have a name?

Q. (By Mr. Morris) How about Eichhorn? You are not aware of the fact that Eichhorn was found not guilty on two different occasions for the same alleged offense? A. I wasn't involved in that case.

Q. Are you aware of it?

(The Court) Is Eichhorn a clerk in this store?

(Mr. Morris) Yes, sir.

(The Court) I thought I might take judicial notice of that.

(Mr. Morris) I thought I could get it in to the testimony without your taking judicial notice.

(Mr. Marin) I object to the question on the grounds –

(Mr. Morris) I will withdraw the question. Thank you, Mr. Sutherland.

(The Court) Was Eichhorn, was not in the store on any of his visits?

(The Witness) No, sir, he was not.

(T. 52) (The Court) Are you through with this witness?

(Mr. Marin) Yes, Your Honor, I am.

(Witness excused.)

(The Court) Who is next?

(Mr. Marin) Detective Craven.

Whereupon,

STEPHEN L. CRAVEN

was called as a witness by and on behalf of the Complainant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marin:

Q. Detective Craven, will you please state your full name and occupation. A. Stephen L. Craven, investigator for the Fairfax County Police Department.

Q. Are you familiar with premises known as 5898 Leesburg Pike in Falls Church – A. Yes, I am.

Q. – County of Fairfax.

(Mr. Marin) Your Honor, I am going to go through the same – and if Mr. Morris has no objection, I am going to introduce another –

(Mr. Morris) Might I inquire as to the dates?

(T. 53) (Mr. Marin) The date of what?

(Mr. Morris) Of whatever you have got there. What are the dates we are talking about?

(Mr. Marin) The date of arrest was December of '75.

(Mr. Morris) I would object to it, Your Honor, based on the prior ruling that this is subsequent to the notice to vacate.

(The Court) December what, '75?

(Mr. Marin) Well, the –

(The Court) When is the trial?

(Mr. Marin) The conviction is dated March 3, 1976.

(The Court) Not the conviction. When was the, when was the date of the offense, not the arrest.

(Mr. Marin) Date?

(The Court) Is that an indictment?

(Mr. Morris) A warrant, I believe.

(Mr. Marin) On or about the 16th day of October.

(The Court) All right. Objection overruled. I take it it is 1975?

(Mr. Marin) Yes, Your Honor, it is.

Q. (By Mr. Marin) Did you have occasion to visit the premises known as 5898 Leesburg Pike? (T. 54) A. Yes, I did.

Q. When did you visit the premises? A. It was approximately noon on the 16th of October, 1975.

Q. And what did you see when you arrived at the store? A. There were various magazines displayed on shelves and cases, shelves, metal racks on the walls. There was a counter in the inside and there was a portion of that counter that was glass to display various rubber products, there was a counter behind which was a clerk with a cash register. A portion of that counter was a plexiglass and there were rubber products, marital aids on display there for sale.

Q. What did you do? A. I browsed through the store for a few minutes and asked the clerk if they were going to install movie machines in the rear?

(Mr. Morris) I object to the response.

(The Court) Why?

(Mr. Morris) Because I don't know who the clerk is or –

(The Court) Do you know who the clerk was?

(The Witness) Yes, sir, it was Allan Sands. He is deceased.

(T. 55) (The Court) Go ahead. You asked him what?

(The Witness) Beg your pardon, sir?

(The Court) You asked him what?

(The Witness) I asked him if they were going to install movie machines in the rear portion of the store and he said it would probably be within a few days, probably sometime in the next week and I asked him if he knew specifically which day those machines would be installed and he stated he did not know that.

And at that time he asked me if I wished to purchase a film and I stated that I was interested. And at that time, he took me back into the rear restroom, pulled out a cardboard box from behind the toilet in the restroom and inside that cardboard box were approximately 19 films.

And he said they were for sale and I could look through the films and pick the one I wanted.

I did pick a film entitled "Don't Let the Bedbug Bite, Part I," and paid Mr. Sands $25 in U. S. currency at the front cash register.

Q. (By Mr. Marin) After you left the store, what did you do, Detective Craven? A. I noted on the film and the bag that he had placed (T. 56) it in the date and time of the sale, the amount of the sale and who it was purchased from and my initials.

Later that day, approximately 3:30, a special magistrate of Fairfax County viewed the film and it was obscene and a warrant was subsequently issued.

(Mr. Morris) I believe the court can take judicial notice that the magistrate does not make final rulings, just finds probable cause.

(The Court) Then there was a subsequent date of prosecution?

(The Witness) Yes, sir, there was.

(The Court) Do you have those records?

(Mr. Marin) Yes, sir, I do.

(The Court) Show them to Mr. Morris.

(Mr. Morris) If Your Honor please, it is exactly the same order that you admitted before; the same conditions and my objection would be the same.

(The Court) This is the same order? This is not a new one?

(Mr. Marin) It is another conviction, Your Honor. One is a conviction on "The Succulent Housewife" and there is another conviction of "Don't Let the Bedbugs Bite." There are two convictions on the same day, Your Honor, two felonies.

(T. 57) (Mr. Morris) They were tried by the same jury and combined for the purpose of expediency.

(The Court) Same objection and same ruling. It will be admitted as Plaintiff's Exhibit 4, Complainant's Exhibit.

(The document previously referred to was marked Complainant's Exhibit No. 4 for identification and received in evidence.

(Mr. Morris) Yes, Your Honor.

Q. (By Mr. Marin) Detective Craven, did you have occasion to visit the store in any subsequent occasion? A. Yes, sir, I did.

Q. And in your opinion, was the same type of material being sold?

(The Court) When? When was this? Did you go back on the 6th of April too?

(The Witness) I am not sure if it was exactly the 6th of April. I may have been back to the store on subsequent occasions.

(Mr. Morris) Might I call to Your Honor's attention, on these convictions, assuming they are valid convictions, (T. 58) they dealt with films. The prior witness testified those films are no longer being sold. So with reference to similar material I obviously object because those convictions are not on similar material.

(Mr. Marin) That is what the other witness saw. I am asking what this witness saw.

(The Court) Objection is overruled.

Q. (By Mr. Marin) Was the same type of material being sold, based upon your observation when you subsequently visited the store as were being sold on the 16th of October, '75? A. The magazines that were displayed on the metal racks and the rubber products or marital aids were of a similar type. On the subsequent visits, the movie machines had been installed and on one of the machines, inspecting the films or viewing the films that were inside of those machines, one of those films was the film or the portion that I saw of it was similar to the portion or portion of the film, "Don't Let the Bedbugs Bite," on which we had the conviction.

Q. Did you say when this was that you stated that, approximately when? A. It was subsequent to that, maybe a month or two after. We had gone in periodically since then.

(T. 59) (Mr. Marin) I have no further questions, Your Honor.

CROSS-EXAMINATION

By Mr. Morris:

Q. Detective Craven, is it fair to say based on your information that there are no films being sold there now? A. To my knowledge, no, not now.

(The Court) I didn't hear that.

(The Witness) Not to my knowledge, there are none being sold now.

Q. (By Mr. Morris) And the convictions that you are referring to are those that occurred in the year of 1976? A. Five.

Q. Six. Convictions of those convictions weren't returned until this year.

(The Court) Third of March, '76, correct.

(The Witness) Yes, sir.

(Mr. Morris) I have no further questions. Oh, I do, excuse me. I am sorry.

Q. (By Mr. Morris) When you went in there, did you observe as much as you could about the operation and the layout of the store? (T. 60) A. Yes, sir, as much as I could.

Q. Did you observe they had a retail license there? A. Yes, sir.

Q. Did you observe that they collect tax there? You paid tax yourself for the items that you purchased, is that correct? A. Yes, sir.

Q. And you in fact saw the Fairfax County retail license right on the wall? A. I believe it is in the counter near the cash register.

Q. But you had observed it? A. Yes, sir.

Q. And that license was valid? A. Yes, sir.

(Mr. Morris) No further questions.

(The Court) Thank you. May this witness be excused?

(Mr. Marin) Yes, Your Honor.

(The Court) You are free to go, Detective Craven.

(Witness excused.)

(Mr. Marin) Detective McNichol.

(T.61) Whereupon,

DAVID ALEXANDER McNICHOL

was called as a witness by and on behalf of the Complainant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marin:

Q. Detective McNichol, could you state your full name and occupation. A. David Alexander McNichol, Police Officer with Fairfax County Organized Crime Section.

Q. Did you have occasion to visit the premises known as 5898 Leesburg Pike, Falls Church? A. Yes, sir.

Q. When did you visit the premises, on how many occasions? A. Four different occasions.

Q. Did you observe what articles or items were available for sale? A. Yes, I did, sir.

Q. Were there any school supplies available for sale there; notebooks, pads or things of the like that would fall under the general category of school supplies? (T. 62) A. Not that I noticed, sir. No.

Q. Were there any textbooks, there, notebooks? A. No, sir.

Q. How would you describe the nature of the items for sale?

(Mr. Morris) Your Honor, that wouldn't be the test really.

(The Court) I don't think it is either. It has got to be illegal. The other theory is fraud.

(Mr. Marin) That is what I am getting at, Your Honor.

(The Court) Well, just don't get his opinion. Ask him what he saw there for sale?

Q. (By Mr. Marin) What did you see for sale, Detective McNichol? A. I saw a variety of magazines that were for sale, some paperback books for sale, some which you could call narcotic paraphernalia that was for sale that is legally sold.

I also saw movies that were shown in the rear of the store. They were for rent for a quarter.

Some of the magazines in the store, a good variety of the magazines in the store depicted nudity on the covers

(T. 63) of the magazines. The magazines were wrapped in clear plastic wrappings so that you could not open the magazines and view the contents, what was inside.

Q. How would you, in your own words, describe the nature of the store in terms of selling items? I mean is it a leather store or cleaning store? A. It is an adult bookstore.

Q. And the nature of the material all related to – what did they all relate to? What did they all relate to, anything in particular? A. Well, in my mind, they –

(Mr. Morris) Well, Your Honor, what is in his mind is probably the least material element of the entire case. What was in his mind or someone else's mind is not the test. He is not even a party to the lease one way or the other.

(The Court) All right. We don't want what was in your mind. What was it as you observed it?

(The Witness) Well, I observed magazines and some books in the store that had nude people on them, some in suggestive poses, suggesting penetration between adults.

And I felt it was an adult bookstore; that the magazines contained material on sex.

(T. 64) Q. (By Mr. Marin) Did you cause, did you take any action based upon what you saw subsequent to your visits to the store? Did you cause arrest to be made? A. Yes, I did, sir, of two people.

(Mr. Morris) Might I inquire as to the dates. I think Your Honor already ruled as to the materiality of any –

(The Court) When were your arrests, Detective McNichol?

(The Witness) My arrests were on April the 7th, 1976, and July 21, 1976.

(Mr. Morris) I object, Your Honor, to any testimony –

(The Court) I think the objection is well taken, what do you have to say to that?

(Mr. Marin) I am trying to establish it is a continuing operation here of selling pornography from the date the notice was written up until the present time and past the time the suit was filed. They are selling the same type of pornography.

(The Court) Your objection is sustained.

(Mr. Marin) I have no further questions of this witness, Your Honor.

(The Court) I would like to know, did you fix the (T. 65) dates for your visits? You said you made four visits.

(The Witness) Yes, Your Honor, I made visits there on March the 29th, 1976, April the 7th, 1976; an arrest was made April 7, 1976.

Then on the other times was July 14th, 1976, July 20th, 1976; and an arrest being made July 21st, 1976.

(The Court) All right. I don't think any of that is admissible. Thank you, Detective. You can stand aside. Can he be excused.

(Mr. Morris) Yes, sir.

(Mr. Marin) Yes, sir, Your Honor.

(Witness excused.)

(Mr. Marin) I would like to call a Mr. Findley, please.

(Mr. Morris) With Your Honor's permission, I am aware of the next witness. I have a knowledge of his testimony. And in that connection, I believe I would stipulate to what he would say if Mr. Marin wants to proffer to the court and that would save the time of having the witness in fact testify.

(The Court) Who is Mr. Findley?

(Mr. Morris) He is a witness that I presume is going to testify as to the local contemporary community standards (T. 66) as to obscentiy in the County of Fairfax.

(The Court) Then let him testify. Go ahead.

Whereupon,

WILLIAM FINLEY III

was called as a witness by and on behalf of the Complainant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marin:

Q. Mr. Findley, would you please state your full name. A. William Findley, the third.

Q. And what is your occupation, Mr. Findley? A. I own and operate an insurance agency in Bailey's Crossroads, Virginia.

Q. And where do you live? A. 5844 Glen Forest Drive, Bailey's Crossroads, Virginia.

Approximately what is the distance between your home address and the Forest Glen Shopping Center? A. Half a mile.

Q. Are you familiar with the premises known as 5898 Leesburg Pike, which is the bookstore in the Glen Forest Shopping Center? (T. 67) A. Yes.

Q. Have you had occasion to visit that bookstore? A. Yes.

Q. When did you visit the bookstore? A. Approximately four to six weeks ago. Possibly even more than that.

Q. And what did you observe?

(Mr. Morris) Your Honor, might I tender an objection. I thought we were going to get into another area. This is long after the alleged breach, if in fact a breach occurred. I think you already ruled on the materiality of this type of evidence.

(The Court) I think Mr. Morris is right, Mr. Marin. How does what has happened since the filing of the suit have any bearing on whether or not you sustain your cause of action and are entitled to relief?

(Mr. Marin) Well, the same type of material is being sold as on the date –

(The Court) You haven't established that. Was he in there prior to six weeks ago? Were you in there prior to the six –

(The Witness) I am not sure when I was in there. I was in there prior to my first appearance as a community (T. 68) witness.

(The Court) Well, this suit was filed on the 6th of December. I am sorry, the 19th of February.

(The Witness) Of '76?

(The Court) Right. Were you in there prior to that?

(The Witness) No, sir, I am sure I wasn't.

(The Court) I am glad to hear what you have to say, Mr. Marin, as to how it has any bearing.

(Mr. Marin) The same type –

(The Court) If it all occurred subsequently to your filing the suit, I suppose you didn't have any evidence except what happened after the second of –

(Mr. Marin) Well, the Detective Sutherland did visit the store. The arrest was made and the same type of material was being sold.

In other words, the exact film wasn't being sold because that was the subject of the conviction. But there were similar films of a similar nature. And there is a continuing operation both before, during and after filing of the suit.

(The Court) Sutherland was in there in October. Has he been in there since October?

(Mr. Marin) Were you there subsequent to –

(T. 69) (The Court) No, he was in there April the 7th and there were the same books and films and so forth. If this man can testify that the same things are in there now that were in there on or before the 19th of February, I think he is qualified.

Q. (By Mr. Marin) When was the first time you visited the store, do you know approximately when? A. I know it was before, prior to the first time I appeared as a community witness in a case for Mr. Sutherland.

Q. What case was that? A. And I don't – I am sorry, I, I don't remember when it was. I have appeared several times.

(The Court) All right. Well, based on Mr. Sutherland's testimony that it was substantially the same in April as it was in October, I will let this witness testify over your objection, Mr. Morris.

(Mr. Morris) Yes, Your Honor, might I also suggest, he doesn't know what was in there in April. He doesn't know what was in there in April at all. He wasn't in the store in April. I was in there six weeks ago, that is his testimony. He knows when he was in there.

(Mr. Marin) Let me ask the question.

Q. (By Mr. Marin) How many times were you in the store? More than once? A. No, one time.

(Mr. Morris) Which was six weeks ago?

(The Witness) Six weeks is approximate.

(Mr. Morris) At maximum two months ago.

(The Court) I don't think you can qualify. Mr. Marin, objection sustained.

(Mr. Marin) All right. Next witness, please.

(The Court) You are free to go, Mr. Findley.

(Witness excused.)

(The Court) Have you got the same problem with your next witness?

(Mr. Marin) I think she is very familiar with the store, almost from the day of its opening. I think that is a fair statement, Mr. Morris.

(Mr. Morris) Not quite.

(The Court) Mrs. who?

(Mr. Marin) Mrs. Clore.

(T. 71) Whereupon,

WINIFRED A. CLORE

was called as a witness by and on behalf of the Complainant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Marin:

Q. Mrs. Clore, would you please state your full name? A. It is Winifred A. Clore.

Q. And your occupation? A. I am a housewife.

Q. And your residence? A. 5847 Glen Forest Drive, Falls Church, Virginia.

Q. How far is that from 5898 Leesburg Pike in Falls Church, which is within the Glen Forest Shopping Center? A. About two blocks.

Q. Are you familiar with the premises known as 5898 Leesburg Pike? A. Yes, I am.

Q. Have you had occasion to visit the store? A. Yes, I have.

Q. When did you visit the store?

(The Court) The first time.

(The Witness) Probably about November of last year.

(T. 72) (The Court) Early or late? Before Thanksgiving? Right after the first? When was it?

(The Witness) I don't know exactly when.

(The Court) Go ahead.

Q. (By Mr. Marin) And what did you see?

(The Court) When is the last time you have been in there?

(The Witness) Monday.

(The Court) That is September 20th. Was there any difference when you went there in November of '75 and when you went there in September of '76 as far as the general content of the store is concerned?

(The Witness) Not as far as I can see, no.

(The Court) All right. Go ahead, Mr. Marin.

Q. (By Mr. Marin) Did you find any school supplies or textbooks being offered for sale in the store? A. No.

Q. In your opinion, how would you characterize the nature of the store?

(Mr. Morris) Objectionable, Your Honor. She is not an expert really. The only expert is legal opinions. (T. 73) She can testify as to what she observed but she is not qualified to give an opinion.

(The Court) All right. Go ahead. Tell us what you saw.

(The Witness) I saw a magazine that had oral sex, sodomy, and intercourse portrayed and also in the magazine –

Q. (By Mr. Marin) Did you find these offensive? A. Yes.

(Mr. Morris) I object to that, Your Honor.

(The Court) Overruled. Go ahead. What else did you see?

(The Witness) Dilidoes, vibrators.

(The Court) I didn't get the first one.

(The Witness) I don't know the name of them. But paraphernalia, I call them.

But I think, I have since seen in the paper that they call them dilidoes or something.

(The Court) All right. You call them that too, then.

(The Witness) And paraphernalia for marijuana. Dummies with their private parts protruding.

(The Court) Were they wax?

(The Witness) I don't know if they were wax. They (T. 74) could have been plastic.

(The Court) All right.

(The Witness) Life size. Or maybe bigger. Magazines and little booklets, little pocket novels.

(The Court) What about them?

(The Witness) Well, the insides of some of the magazines were what I would consider obscene.

(The Court) Well, tell me what they were. Maybe I don't agree.

(The Witness) Well, I have a magazine like, or a pocket novel my daughter found in front of that store and they have similar ones in the store.

(Mr. Morris) I object to that. The fact someone found something in front of the store is irrelevant.

(The Court) Okay. So the same thing is inside. Go ahead.

(Mr. Marin) What was your reaction?

(The Court) She is groping for words, go ahead.

(The Witness) One in particular, it looked like it was really geared for 13, 12, 13, 14 year olds. It was "The Curious 14," it had two naked people on the front.

In the middle it had drawings of the girl having sex with three people through the mouth, through the rectum and through the vagina. And these are the type of pictures that were in it.

Q. (By Mr. Marin) And what was your reaction to this? A. I just think it is offensive. I think it is obscene. It just sort of makes you sick to see it.

(Mr. Marin) I have no further questions, Your Honor.

(Mr. Morris) Just one or two questions.

CROSS-EXAMINATION

By Mr. Morris:

Q. With reference to the material you just described, involving 13 or 14, you are not suggesting to the court that 13 or 14 year olds can go in there and buy things, are you? A. No.

Q. As a matter of fact, you know from your own firsthand knowledge that juveniles are not permitted in that store. A. That is what it says on the door.

Q. You have never seen a juvenile go in there, have you? Or one that you have known to be a juvenile? A. I wouldn't know if it was a juvenile going in.

Q. With reference to the particular matter that your daughter found, you are telling us your daughter that she found that on the sidewalk? (T. 76) A. Right on the parking lot in front of the store.

Q. That is a big parking lot, isn't it? A. Yes, it is. But it is the entrance that that particular store has.

Q. Or any other store that you wanted to go to from that area of the parking lot? A. Well, Mr. Morris, I went in the Dart Drug to see if they carried this particular book by the author or the publisher and they didn't.

Q. They did not? A. I went in the store, and they did.

(Mr. Morris) I have no further questions.

(The Court) And they what?

(The Witness) I went in that store to see if they carried it and they did.

(The Court) I can't hear whether they did or did not.

(The Witness) They did carry that particular series and by the author.

(The Court) Thank you.

Q. (By Mr. Morris) Did they carry that specific book, are you telling us? (T. 77) A. Not that specific book but books by that author and the publisher.

Q. You are aware that some authors have written classics and the same author has written things that aren't so classic, right? A. Yes.

(Mr. Morris) I have no further questions of the witness.

(The Court) You are excused. You are free to go.

(Witness excused.)

(Mr. Marin) I have no further witnesses, Your Honor.

(The Court) Complainant rests.

(Mr. Morris) I move to strike the Complainant's case for the following reasons. The plaintiff comes before the court, if Your Honor please, and he is alleging fraud and inducement.

As I understand the law on fraud, whether it be inducement or fraud subsequent, the amount of evidence that must be persuasive must be that type of evidence which is clear and convincing.

If Your Honor please, the burden on a plaintiff alleging fraud carries a greater burden than one who alleges a breach of a contract. I believe that is almost Horne book (T. 78) law and would not need any great citations.

But more particularly, I would like to call Your Honor's attention to the case of Erlich versus Hendrick Construction Company, decided by, out of this Circuit Court and an opinion by Justice Richard H. Poff, decided June 11, 1976.

The case is new, I cannot give you a page number. But it is 217 Va, and I have the case here before me.

In that connection, I would like to read one of the principals that the Supreme Court of Virginia has relied on. "The rule which excludes parole evidence when offered to vary the terms and conditions of an integrated written contract has nowhere been more strictly adhered to in its integrity than in Virginia. It, in effect, declares that where parties have reduced their contract to a writing which imposes a legal obligation in clear and explicit terms, the writing shall be the sole memorial of that contract, and it is conclusively concluded that the writing contains the whole contract and is the sole evidence of the agreement."

I wish to bring that to Your Honor's attention because then they cite, continue to cite numerous cases which have maintained parole evidence ought not be admitted to change the written terms of the contract.

(T. 79) I would also like to remind Your Honor, if Your Honor please, that where a party to a contract prepares the contract, if there is any ambiguity, then that ambiguity will be decided in favor of the person that did not prepare it.

You have before you a lady who has had considerable experience in negotiating properties and property

management. At the time of this contract, her husband was ill.

However, she had been the chief executive of certain of the corporations long before he died by her own testimony. And they said she even, as an after thought, if you please, had some suspicions this could be a pornographic bookstore although there was no evidence to support that.

And she suggests to the court that even with those apprehensions, even with those fears, if you please, she who made up the contract, still failed to insert the limitations of the tenants' activities.

As an additional matter, Your Honor, I would respectfully suggest that when she notified the tenant that he was in violation of the lease, the only violation she chose to mention was the violation of exterior signs which, in fact, did not exist.

I would respectfully suggest, Your Honor, that the plaintiff, who I am sure means well, did not in fact carry (T. 80) her burden of clear and convincing evidence of proof of fraud. The law that has been so well established in this Commonwealth as to the integrity of contracts cannot now be changed by what the landlord thinks she should have put in the lease or what in fact was inserted into the lease.

Plus the fact that there is absolutely, in our understanding of the evidence, no evidence here to support that Mr. Pryva had the authority, expressed, implied or otherwise to bind his principal in the form of a written contract under seal.

I would respectfully suggest that the plaintiff did not carry the burden and ask that the evidence be struck.

(The Court) How about the other part, the illegal operation?

(Mr. Morris) Your Honor, this is an area that Your Honor has some knowledge of it, because I believe you sat on a particular case involving some matters from another store. And until, until, Your Honor, a particular item is declared obscene, it loses its constitutionality or the protection of a constitutional cloth.

There are a lot of matters that may be offensive. There are a lot of matters that may be upsetting. But until there is an adjudication by a judicial body that a particular (T. 81) item is obscene, it is not obscene.

(The Court) Let me go back and read you the lease. The lease says, article 11, "The tenant agrees not to use, occupy, sell in any manner any purpose contrary to law."

(Mr. Morris) Yes, sir.

(The Court) Now what have you got to say to that?

(Mr. Morris) I say, Your Honor, there is no lease of that premises contrary to law until there is a, one –

(The Court) "To use the premises in any way contrary to law." And you don't think they have sold illegal magazines and films?

(Mr. Morris) This is the uniqueness of the obscenity statute. It is not a crime until it is adjudicated as a crime.

(The Court) What do you call these convictions?

(Mr. Morris) Might I suggest to the court there have been sales out of that store of the same material where the person charged was not convicted. So the point I am trying

to make is at what point does the court get into rewriting written contracts between the parties when the contract itself doesn't call for it.

The constitutional protection that one has with reference to selling a particular item, until that item is declared obscene, it in fact is not obscene. I think the law (T. 82) is clear on that.

And might I further suggest to the court that if Your Honor is going to take those two convictions which would impress you or persuade you in any fashion, I have some cases here that say the running of numbers out of a leased premise is, the two convictions would not stand as a continual nuisance.

(The Court) I am not talking about a nuisance.

(Mr. Morris) Or illegal purpose. What they said in the numbers case, numbers to begin with is illegal, whereas they have no constitutional protection of any kind; whereas films and literature do have that protection. So, it would –

(The Court) Well, your motion to strike it denied. Now, you go ahead and put on your case.

(Mr. Morris) With Your Honor's indulgence –

Your Honor, if Your Honor please, with the reference to Mr. Marin's original motion to strike my counterclaim, I would proffer to the court that an attempt was made to get a certificate of authority to transact business in Virginia from the Maryland corporation back in January. They have not secured that certificate and I believe his motion is well taken with reference to the cross claim.

(T. 83) I do not have a certificate of authority to establish the right to transact business in Virginia with reference to the Title 13 wherein they are a foreign corporation.So for that purpose, I inform the court.

(The Court) So you suffer a non-suit as to your crossbill.

(Mr. Morris) Yes, sir.

(The Court) All right.

Whereupon,

JOHNNY RICHARD JONES

was called as a witness by and on behalf of the Defendant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Morris:

Q. Will you kindly tell the court your name and your corporation capacity. A. Johnny Richard Jones. I am the president of Crossroads Books.

Q. Now, Mr. Jones, did you sign the lease that is in issue here today? A. Yes, I did.

Q. Did you ever authorize anyone to negotiate a lease (T. 84) for you other than the terms of the lease that is in issue? A. No, I did not.

Q. Did you ever authorize Mr. Pryva to negotiate a lease other than what is called for in paragraph 4? A. No, I did not.

(Mr. Morris) I have no further questions.

(The Court) Did you know Mr. Pryva?

(The Witness) Yes, I do.

(The Court) Was he connected with the company?

(The Witness) Not at all.

(The Court) Do you want to ask him any questions?

(Mr. Marin) I am very puzzled.

(The Court) You just ask the questions.

CROSS-EXAMINATION

By Mr. Marin:

Q. You are not suggesting to the court, Mr. Jones, that this lease fell out of the sky and you signed it? A. Not at all. I was looking for a proposition. Mr. Pryva was aware of that, came across a location, informed me of the location, and went about then finding out about what the situation would be, how we would go about obtaining the lease. All he did was bring the lease to me to be signed. I approved the lease, I read it, approved it.

Q. He brought the lease to you to be signed? (T. 85) A. Certainly.

Q. And you wanted him to go find the location for you? A. That wasn't exactly the case. He was aware of the fact I was trying to go into business. I was looking for something to get into. He found the location and suggested it to me. Trying to help me out.

Q. And he brought the lease to you? A. He spoke to Mrs. Dominguez, as I understand, and arranged it, brought the lease, which she drew up, and brought the lease to me for my approval which I approved.

(Mr. Marin) I have no further questions, Your Honor.

(The Court) Did you pay him any commission?

(The Witness) No, I didn't.

(The Court) Just a friend?

(The Witness) He is my brother-in-law, in fact.

(The Court) All right.

(Mr. Morris) That is the defendant's case, Your Honor.

(Witness excused.)

(The Court) The defendant rests. All right.

Do you all want to make any argument?

(Mr. Marin) Yes, Your Honor. Mr. Morris was kind enough to furnish me with a copy of the case to which he (T. 86) refers, the Erlich versus Hendrick Construction Company. That is a mechanic's lien case, Your Honor. It is a very complicated mechanic's lien case. It involves a written contract and oral statements directly contrary to the written agreement and there was allegation of fraud in that case.

And the judge held that no party proved fraud. So that count was eliminated. It was subsequently remanded, tried again on issues.

There is no question that parole evidence is not admissible to vary the expressed terms of a written contract and that is what this case holds and many many cases in Virginia going back, I think, for 200 years. But that is not the issue in this case.

In this case we are talking about a Mr. Pryva who is known to Mr. Jones, who acted for him on behalf of Mr. Jones by finding a location.

He made representations to Mrs. Dominguez as stated by Mrs. Dominguez. Mrs. Dominguez was enticed to believe and did believe it was going to be used as a family bookstore; that they were going to sell school supplies and this was not the case.

But for the reliance, there would have been no lease.

(T. 87) For authority of the proposition, Your Honor, in connection with fraud and the inducement of a lease, I would invite Your Honor's attention to Garrett versus Finch, at 107 Va., at page 25. Where somebody induced a tenant to come into the premises by saying there is going to be a pier built and there was no pier ever built.

And that was held to be fraud in the inducement and the lease was rescinded.

In connection with the agents, the authority of agents, agents making representations, there are two pertinent cases on that subject, Your Honor; one being White Sewing Machine Company versus Gilmore Furniture Company, 128 Va. 630, where an agent made representations as to warranty works which were expressly denied by other documents and so on.

It was proven that there was reliance on these representations by the agents and the court holds that where the principal wants to take advantage of the benefits of the contract, it must also be bound by the detriments associated with the contract, if in fact there was a fraud or misrepresentation made in connection with its procurement.

The other case, Your Honor, is Packard Norfolk versus Miller, at 198 Va., at page 557. The complaint talks in terms of three counts; the one being fraud, which I have (T. 88) just discussed and the third one being a violation of the expressed terms of the lease; to wit: an unlawful activity being conducted on the premises.

A conviction has been obtained and we are not attempting to define the obscenity laws or litigate the obscenity laws or whatever.

We are, however, saying there was an unlawful activity on the premises; there was a conviction for the unlawful activity. This is in violation of the lease and the lease was breached by the defendant.

Insofar as taking the rent is concerned, if somebody occupies the premises under any arrangement, it cannot undertake to perform illegal activities and get it rent free.

And if this is a serious question, I would be more than happy to brief the point, Your Honor, but I don't think that one can derive the benefit from his own wrongdoing and get it rent free.

I think it is inequitable and contrary to law. We are not saying, Your Honor, that everything sold in the store is unlawful. We are saying that things sold in the store have been adjudicated unlawful in violation of the lease.

Mrs. Dominguez has stated that her husband managed the property and made leases and all that. And she didn't (T. 89) have counsel.

Yes, she is an officer of the corporation; she is familiar with the real estate and I am sure she may have signed one or more leases.

But her husband managed it. And at that time, she was in a very peculiar state of mind, a very difficult and trying state of mind. Her husband was deathly ill and died several days after the making of the lease.

In light of the evidence adduced and the documentation presented, Your Honor, I move this court for a judgment and for the recession of the lease and for possession of the premises and eviction.

(The Court) All right, Mr. Morris.

(Mr. Morris) Very briefly, Your Honor, I don't believe there is any evidence before the court that the judgment on behalf of Mrs. Dominguez, I don't think he put on any evidence that you can rely on for the purposes of relying on judgment for the purposes of monitary settlement.

But what I would like to call to Your Honor's attention is still going back to the sanctity of a written contract in the Commonwealth of Virginia. It seems that our Supreme Court has repeatedly held that evidence pertaining to an alleged separate oral agreement is not to stand in the (T. 90) shoes and have any dignity as to the written contract where the contract is the sole memorial to the part of the agreement.

And in that connection, it seems to me notwithstanding Mrs. Dominguez' frame of mind – and certainly I would sympathize with her under those circumstances – but she had in fact entered into a contract. She had in fact collected the rents each and every month since the contract was entered into.

It might be somewhat enlightening to suggest to the court that a landlord certainly by accepting rent can waive any alleged violations or breaches in a lease. And I think that law is quite clear; that a contract, a landlord can in fact, by accepting rent, waive any alleged breach.

I go one step further and I suggest to the court there is no breaches in this written contract.

With reference to the condition of the landlord at the time that they entered into the lease, Your Honor is presumably aware of real estate as much as anyone; that you may not come into the court a year later or six months later or two months later and say, "Well, gee, I really didn't mean that; I meant something else."

And since the landlord prepared the lease, presented (T. 91) it for endorsement by the corporate officer of the Crossroads Books, she in turn signed it after it was signed by him and not in one article, if Your Honor please, does it ever suggest that she meant to lease the premises for any other purpose than the sale of what they in fact were selling, books and magazines and related materials.

I somewhat become concerned when we begin to permit parole evidence to come into a contract that is really not ambiguous; if you please, that a contract that is not contradictory, if you please; a contract that is not conditional, but is unconditional. And then the landlord notifies the tenant and says your exterior signs are there, you must vacate.

That failed because, in fact, there wasn't any exterior signs. So upon finding that, she failed to evict him on that notification; then seeks counsel and says, "Under what basis can I evict these tenants?". There is only one possible basis that the tenants could possibly be evicted on, if Your Honor please, and that would be fraud. And I think we all know that fraud must be presented in evidence that is clear and convincing.

And surprisingly enough, we don't even have any written documentation by the plaintiff to support her parole (T. 92) evidence that she wished the court to take.

Also, if Your Honor please, the tenant who signed the lease says that he did not authorize anyone to make the terms of this lease other than what the lease itself calls for.

Your Honor, I feel that the law is clear on this issue and I would ask the court to strike the plaintiff's case and ente judgment for the defendant.

(The Court) Have you got any authority as to say that after they give notice under paragraph 25 of the termination of the lease, they can't receive rent?

(Mr. Morris) Yes, sir, I believe I do.

(The Court) I would like to hear that; and if they receive rent, they waive the default.

(Mr. Morris) Yes, sir. Might I call the court's attention to Waukegan Times Theatre Corporation versus Conrad. That was the Appellate Court of Illinois. It was reported 168 ALR 508. And what that case stood for, Your Honor, was that the clause in the lease – I think this one says if there is an acceptance of rents after it falls due or after having knowledge of lessee's breach of lease or giving any notice of demand, should not be construed as a waiver of lessor's rights or an election not to proceed – let me (T. 93) finish. I think there is more to it. I have got both sides.

(The Court) All right.

(Mr. Morris) As an election not to proceed under the lease for lessor's benefit and has no force as to waivers implied by law unless there was contact amounting to estoppel and does not grant an oral waiver inoperative. That is one for Mr. Marin.

(The Court) All right. I don't know of any such law. If you did, I would listen to you.

But I am agreeing with you that I am not satisfied on the fraud basis. But I am satisfied on the paragraph 11 basis, that they are entitled to relief.

I think that the lease was violated under paragraph 11. The tenant used the property for an unlawful activity; that is for a purpose contrary to law and they violated paragraph 11 of the lease, and that it constituted a default in the performance by the tenant, that the landlord gave written notice as evidenced by, I think it is, Exhibit Number 3 or 4 – anyway, the letter from Mr. Marin, and he had a right to terminate the lease.

And I think they terminated the lease and I don't think they waived this right by accepting the rent.

So if you want to prepare a decree, I will sign it. (T. 94) You give it to Mr. Morris and let him put his exceptions in it.

Now, I don't know whether he is going to appeal. I assume he will.

So, you can suspend the execution for thirty days and he will have to put up a bond of $500. He will have to file his notice of appeal and assignments of error within thirty days.

(Mr. Morris) All right, Your Honor. For the record, would you permit me to take exception to your ruling?

(The Court) Yes, sir, you can put it right into the decree.

(Mr. Marin) Yes, Your Honor.

(Mr. Morris) In the decree that is going to be prepared?

(The Court) Mr. Marin is going to prepare the decree and submit it to you for you to see that he put all your exceptions in it.

(Mr. Morris) Thank you, Your Honor.

(Whereupon, at 4:00 o'clock p.m., the proceedings in the above-entitled matter was concluded.)

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TOA ENTERPRISES, INC.
Complainant

v.

CROSS ROADS BOOKS, INC.
Defendant

In Chancery No. 48925

DECREE
Entered October 7, 1976

THIS CAUSE came on to be heard on the 22nd day of September, 1976, upon the Complainant's bill and exhibits filed therewith; and was argued by counsel.

And the Court having considered the said Bill of Complaint, the exhibits filed by the Complainant, and the testimony of all witnesses, this Court does hereby find that Defendant, Cross Roads Books, Inc., has violated the provisions of Article 11 of the Lease Agreement dated September 8, 1975, by and between TOA Enterprises, Inc., and Cross Roads Books, Inc., which violation constitutes a default under the terms of said Lease by Defendant. Accordingly, it is hereby

ADJUDGED, ORDERED AND DECREED that said Lease is hereby terminated, the Complainant is entitled to possession of the premises and the Defendant is hereby ORDERED to vacate; and,

It is further ADJUDGED, ORDERED AND DECREED that execution of this Decree is suspended for thirty (30) days, from September 22, 1976, on condition that Defendant file with this Court an appeal bond in the amount of Five Hundred and No/100 Dollars ($500.00) in form satisfactory to the Clerk of this Court.

/s/ James Keith,
Judge
Fairfax County Circuit Court

I ASK FOR THIS:

/s/ Louis J. Marin, Esq.
Counsel for Complainant
1311A Dolley Madison Blvd.
McLean, Virginia 22101

SEEN AND EXCEPTED:

/s/ Thomas J. Morris, Esq.
Counsel for Defendant
2060 N. 14th Street
Arlington, Virginia 22201

APPENDIX E

ORDER DENYING PETITION FOR APPEAL

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 29th day of July, 1977.

The petition of Crossroads Books, Inc., for an appeal from a decree entered by the Circuit Court of Fairfax County on the 7th day of October, 1976, in a certain chancery cause then therein depending, wherein TOA Enterprises, Inc., was plaintiff and the petitioner was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

Record No. 770095

A Copy,

Teste:

/s/ Howard G. Turner,
Clerk

/s/ Richard R. (illegible)
Deputy Clerk

APPENDIX F

IN THE SUPREME COURT OF VIRGINIA

CROSSROADS BOOKS, INC.,
Petitioner

v.

TOA ENTERPRISES, INC.,
Respondent

Record No. 770095

PETITION FOR REHEARING

I

MATERIAL PROCEEDINGS

The petitioner adopts the same material proceedings as set forth in the petitioner's Petition for Writ of Error but further stating that on July 29, 1977 the Supreme Court of Virginia denied the Petition for Writ of Error.

II

STATEMENT OF FACTS

The petitioner, for purposes of this Petition for Rehearing, adopts the statement of facts in the appellant's Petition for Writ of Error.

III

ARGUMENT

In petitioning the Court for a rehearing of its Petition for Writ of Error, the petitioner wishes to bring to this

Court's attention the fact that by affirming the decision of the trial Court without opinion, the Supreme Court of Virginia leaves a serious federal question unanswered. In this Petition for Rehearing, the petitioner desires to focus the Court's attention on the first question raised by the petitioner in its Petition for Writ of Error.

In this case, an employee of the petitioner was arrested, tried and convicted of a violation of the Obscenity Laws of Virginia. As a result, a civil case was brought in the Circuit Court of the County of Fairfax, Virginia by the respondent to, *inter alia,* have the petitioner evicted from the premises, which it leased from the respondent. It must be noted that the petitioner was not a party to the criminal litigation of the employee and the issue of obscenity was not litigated in the civil trial of this case below.

This presents a situation analogous to that in *McKinney v. Alabama,* 96 S. Ct. 1189 (1976). In that case, the defendant was convicted in the trial Court of selling material known to have been judicially found to be obscene in a proceeding to which he was not a party. The Supreme Court of Alabama affirmed the conviction and the defendant appealed to the Supreme Court of the United States. The Supreme Court, in reversing the trial Court held that:

> Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to and lost.
>
> But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. *McKinney* at p. 1194.

By affirming trial Court, without an opinion, the highest state Court has left a serious federal question unanswered. That question is can a party who is not a party to a proceeding concerning the obscenity of a specific item be held responsible for unlawful conduct of another party without violating the First and Fourteenth Amendment rights of that party.

In this case the petitioner did not have the opportunity to participate in the determination that the material in question was obscene. It was not a party to the criminal proceeding in which the material was determined to be obscene and the issue of obscenity was not determined in the trial from which the petitioner appeals. Thus, we have a situation similar to that in *McKinney, supra.*

In effect, the affirmation of the trial Court imposes a restraint on the freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution of the United States; therefore, it is repugnant to the First and Fourteenth Amendments to the Constitution.

If the respondent is allowed to evict the petitioner under the circumstances of this case, then the petitioner will be denied its right to due process of law under the Fourteenth Amendment and a "chill" will result to First Amendment rights. The only way to protect the rights of the petitioner as set forth herein is to allow it to litigate the question of obscenity and for this Court to answer the serious federal question presented it.

IV

STATEMENT

a) The petitioner requests supersedeas.

b) The petitioner desires to state orally why the Petition for Rehearing should be granted.

CROSSROADS BOOKS, INC.

/s/ J. Hatcher Johnson
Of Counsel

APPENDIX G

ORDER DENYING PETITION FOR REHEARING

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of September, 1977.

Crossroads Books, Inc.,
Appellant,

against Record No. 770095

TOA Enterprises, Inc.,
Appellee.

Upon a Petition for Rehearing

On mature consideration of the petition of the appellant to set aside the decree entered herein on the 29th

day of July, 1977, and grant a rehearing thereof, the prayer of said petition is denied.

A Copy,

Teste:

/s/ (illegible)
Clerk

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENTS TO THE CONSTITUTION

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridges by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1950 CODE OF VIRGINIA

OBSCENITY

18.1–227. "Obscene" defined.–The Word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

18.1-228. Production, publication, sale, possession, etc., of obscene items.–Every person who knowingly:

(1) Prepares any obscene item for the purposes of sale or distribution; or

(2) Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or distribution; or

(3) Publishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item, or offers to do any of these things; or

(4) Has in his possession with intent to sell, rent, lend, transport, or distribute any obscene item, shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section "distribute" shall mean delivery in person, by mail, messenger or by any other

means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

18.1-229. Obscene items enumerated.—Obscene items shall include:

(1) Any obscene book or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds.

Supreme Court, U. S.
FILED
JAN 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

NO. 77-791

CROSSROADS BOOKS, INC.

Petitioner

V.

TOA ENTERPRISES, INC.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

LOUIS J. MARIN
1311A Dolley Madison Blvd.
McLean, Virginia 22101
(703) 893-5551

Counsel for Respondent

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7788

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-791

CROSSROADS BOOKS, INC.

Petitioner

v.

TOA ENTERPRISES, INC.

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent TOA Enterprises, Inc., the Complainant below, hereby prays that the Petitioner's Petition for Writ of Certiorari to the Supreme Court of

the United States be denied for the reasons hereinafter set forth.

OPINIONS BELOW

At the conclusion of the Trial, his Honor James Keith stated:

> "I think that the Lease was violated under Paragraph eleven (11). The Tenant used the property for an unlawful activity; that is, for a purpose contrary to law and they violated Paragraph eleven (11) of the Lease, and that it constituted a default in the performance by the Tenant, that the Landlord gave written notice as evidence by, I think it is, Exhibit No. 3 or 4 - anyway, the letter from Mr. Marin, and he had a right to terminate the Lease." (A.89)

The final decree entered by the Circuit Court of Fairfax County, Virginia, recites:

> "And the Court having considered the said Bill of Complaint, the exhibits filed by the Complainant, and the testimony of all witnesses, this Court does hereby find

> that Defendant, Crossroads Books, Inc., has violated the provisions of Article eleven (11) of the Lease Agreement dated September 8, 1975 by and between TOA Enterprises, Inc., and Crossroads Books, Inc., which violation constitutes a default under the terms of said Lease by Defendant [Crossroads Books, Inc.]. Accordingly, it is hereby:
>
> ADJUDGED, ORDERED AND DECREED, that said Lease is hereby terminated, the Complainant is entitled to possession of the premises and the Defendant is hereby ordered to vacate; and...."

QUESTIONS PRESENTED

The Respondent takes exception to the Petitioner's statement of the questions presented, and believes the matter before the Court may be more simply phrased as follows:

1. Whether the First or Fourteenth Amendments to the Constitution of the United States impose restrictions upon the termination of a lease by a landlord

for the tenant's violation of a covenant not to use, permit, or suffer the use, of the demised premises for any purpose contrary to law.

STATEMENT OF THE CASE

1. The use provision of the Lease under which the Petitioner is the Tenant provides as follows:

> "Article 11, Tenant agrees not to use or occupy or suffer or permit said permises or any part thereof to be used in any manner or occupy for any purpose contrary to law or the rules or regulations of any public authority...."

2. With reference to the Petitioner's statements on page 8 of the Petition describing the criminal proceedings against Mr. Allan Sands, employee of the Petitioner, the record is clear.

In Criminal Case No. 22429 and in Criminal Case No. 22430 in the Circuit Court of Pairfax County for the State

of Virginia, Commonwealth of Virginia vs. Allan R. Sands, Defendant, in both cases, the Honorable William G. Plummer entered a Judgment Order of Conviction in each of the two cases pursuant to the findings of the jury in each case on the 3rd day of March, 1976. Mr. Sands was sentenced to serve twelve (12) months in jail for each of the two felony convictions. These Judgments of Conviction remain among the official court records as final Judgment Orders. (Resp. A.1, & A.6)

3. The Order of the Trial Court is based upon a finding that the use clause of the Lease, Article 11, was violated by the Tenant, Petitioner, herein, which entitles the Plaintiff, your Respondent, to terminate the Lease as a matter of law in the State of Virginia. No Constitutional issue was presented before the Court nor was any Constitutional question revelant to the issues presented

to the Trial Court in deciding a basic tenant-landlord dispute. In accordance therewith, the Constitutional rights of the Petitioner and the Respondent were maintained and upheld in the State Court of Virginia.

The Respondent reserves the right to offer additional refinements to the Petitioner's statement of the case should the Writ of Certiorari be granted by this Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITION FOR WRIT FOR CERTIORARI SHOULD BE DENIED FOR FAILURE OF PETITIONER TO MAKE A PROPER AND TIMELY ASSERTION OF ITS FEDERAL CLAIM IN THE VIRGINIA STATE COURTS.

The threshold procedural requirement for Supreme Court review upon Writ of Certiorari is that the tendered federal questions have been presented in a timely

and proper fashion to the state courts. Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). This requirement is regarded as jurisdictional, and the party seeking review must carry the burden of proving that the federal questions were presented to the state courts. Wright & Miller, Federal Practice and Procedure, §4022, Vol. 16, p. 697 (1977 ed.) Where the highese court of a state has failed to pass upon a federal question "...it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in [the Supreme] Court [of the United States] can affirmatively show the contrary." Street v. State of New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969) (per Harlan, J.)

The Petitioner herein asserts deprivation of its First and Fourteenth

Amendment rights by the Virginia State court proceeding. First Amendment rights are alleged to have been violated when the Trial Court, sitting in equity, terminated a lease upon finding that the tenant used, permitted, or suffered use, of the property for an unlawful activity in violation of the lease terms. The Fourteenth Amendment claim apparently relates to the Trial Court's consideration of the criminal obscenity conviction of the tenant's employee based upon conduct within the demised premises. Remarkably, however, the words "First Amendment" and "Fourteenth Amendment" do not once appear in argument, testimony or exhibits in the Trial Court proceedings. (A. 19 et.seq.) Indeed, federal questions were not raised by the Petitioner until its Petition for Rehearing was filed with the Virginia Supreme Court (A. 94-97), and even then the questions there presented were signi-

ficantly different from those before this Court in the instant Petition.

The Petitioner tangentially raised the issue in the Trial Court of whether the goods sold by the Petitioner were presumed not to be obscene until they were adjudicated to be so by a judicial body.[1/] (Petition, p. 10-12) Respondent submits, however, that this issue is not properly before this Court. What is before the Court is whether the First Amendment imposes restrictions on the manner in which a state court of equity may enforce covenants of a lease. The sale of certain items may or may not be constitutionally protected with regard to criminal prosecution, but that question is entirely separate from the issue of whether the

1/ Such an adjudication of the obscenity of goods sold by the Petitioner's employee was, in fact, made. (A.51-52).

sale of the same material may constitutionally be found by a court of equity to be within the contractual prohibitions to which a tenant may be bound. It is this latter question which truly represents the Petitioner's grounds for appeal, and yet this issue was never raised in the state court proceeding.

Even if First Amendment questions are found to have been adequately raised in the Trial Court proceedings, there is no basis for concluding that the Fourteenth Amendment issues were also so raised. The Petitioner states at page 10 of its Petition that the "Constitutional Rights of the Petitioner were raised in the Trial Court with special emphasis on the issue of obscenity...." This assertion is fanciful. If any Constitutional issues were implied, it was only with regard to obscenity. It is for this exact reason that the Petitioner apologizes at page

13 of the Petition by explaining that: "As a result of the unanticipated ruling of the Supreme Court of Virginia ...it became necessary to re-raise [by Petition for Rehearing] the federal question precisely as to the deprivation of due process of law, guaranteed...under the Fourteenth Amendment...." In fact, only upon the Petition for Rehearing did the Petitioner make its first significant claims of Constitutional protection; it was also at that time that federal case law was first cited by the Petitioner, but the federal question came too late for proper consideration by either Virginia or Federal Courts.

By not raising its federal questions prior to the Petition for Rehearing filed with the Virginia Supreme Court, the Petitioner has precluded itself from properly obtaining a Writ of Certiorari. Virginia law precludes appellate considera-

tion of contentions not made in the Trial Court. Parker v. McCoy, 212 Va. 808, 188 S.E. 2d 222 (1972); Clarendon House, Inc. v. Helfert, 213 Va. 28, 189 S.E. 2d 331 (1972). By not raising First or Fourteenth Amendment issues within the Trial Court, these issues are not properly preserved for purposes of Supreme Court review. In addition, "Questions first presented to the highest state court on a petition for rehearing come too late for consideration of the Federal Supreme Court on certiorari...." Radio Station WOW v. Johnson, 326 U.S. 120, 65 S.Ct. 1475 (1945). See Bloeth v. State of New York, 369 U.S. 133, 82 S.Ct. 661 (1962).

For failure to timely raise the federal questions in the proper fashion within the state courts, the Petition for Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED DUE TO THE ABSENCE OF A FEDERAL QUESTION OF SUBSTANCE.

Rule 19 of the Rules of the United States Supreme Court provides that review by writ of certiorari will be granted only in cases which involve federal questions of substance. The Respondent contends that the state court judgment rests on an application of state law which makes it unnecessary to decide any federal questions, and that the state proceedings did not infringe upon any Constitutional rights of the Petitioner. Accordingly, no federal question of substance is presented within the meaning of Rule 19, and Respondent asks that certiorari not be granted.

A. The State Decree Rested on an Application of State Landlord-Tenant Law and Did Not Require Consideration of Any

Federal Questions, Thus Precluding Review upon Writ of Certiorari.

The Suit brought by the Respondent in the Circuit Court of Fairfax County, Virginia, was an action in equity to rescind a lease upon commercial property or terminate the lease for breach of a covenant therein. The Trial Court found that Petitioner, the Defendant therein, violated Article 11 of the Lease, and the Court therefore terminated the Lease. Article 11 reads, in pertinent part:

> "Article 11. Tenant agrees not to use or occupy or suffer or permit said premises or any part thereof to be used in any manner or occupied for any purpose contrary to law or the rules or regulations of any public authority...." (A.10)

It should be noted that the covenant does not prohibit merely illegal activity on the premises; rather it forbids use of the property "for any purpose contrary to law or the rules or regulations

of any public authority." [emphasis added]. The significance of this distinction is governed by state law, and the state court was free to construe the language of the covenant in accordance with state law.

The issues before the Trial Court were those which are present in any action upon a contract: determining the intentions of the parties, interpreting the meaning of the lease terms, ascertaining whether the tenant breached the lease covenants, and then fashioning an appropriate remedy. The terms of Article 11 of the Lease are very broad, and their application is purely a matter of state law which involves no federal questions.

Respondent introduced into evidence Exhibit Nos. 3 and 4 Judgment Orders of Conviction of Allan R. Sands, an employee of Petitioner, for the sale of two films entitled "Don't Let the Bedbugs Bite" and

"Succulent Housewife". Both Judgment Orders of Conviction were entered by the Honorable William G. Plummer on the 3rd day of March, 1976.

These Judgment Orders of Conviction became final after twenty-one (21) days from the date of entry in accordance with Rule 1:1 of the Rules of the Supreme Court of Virginia which provides that all Final Judgments, Orders and Decrees remain under the control of the Trial Court subject to modification or vacation for twenty-one (21) days after the date of entry and no longer. And in criminal cases notwithstanding the finality of the Judgment, the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error or supersedeas.

Rule 1:1 of the Virginia Supreme Court Rules was construed by the Supreme

Court of Virginia consistently over the years to determine the finality of a judgment in a criminal case notwithstanding the suspension of execution of the sentence. In a recent case, the Virginia Supreme Court held:

> "In a criminal case, the Trial Court may postpone execution of the sentence in order to give an accused the opportunity to apply for a writ of error and supersedeas. However, this does not affect the finality of the judgment, and the Trial Court loses control over it after an elapse of twenty-one (21) days from the date of its entry. (Hirschkop v. Commonwealth, 209 Va. 678, 166 S.E. 2d 322, Cert denied, 396 U.S. 845, 90 S.Ct. 72, (1969)."

In accordance with the previous holdings of the Supreme Court of Virginia and in accordance with Rule 1:1 of the Rules of the Supreme Court of Virginia, the Trial Court determined that the entry of the Judgment Orders of Conviction by Judge Plummer on the 3rd day of March, 1976, became final twenty-one (21) days

thereafter and still remain as final Judgment Orders of two felony convictions of Allan R. Sands, employee of Petitioner; and, the Trial Court lost control over these final Judgment Orders after the elapse of twenty-one (21) days from the date of their entry.

A State Court has great leeway in applying lease terms identical or similar to those employed by Article 11. The State Court may infer an obligation to use the property lawfully and for lawful purposes as in Martin v. Medlin, 81 Ga. App. 602, 59 S.E. 2d 519 (1950). State law may provide that mere knowledge by the tenant that immoral and unlawful conduct is being carried on within the leased premises is sufficient to allow recission of the lease. Voghtv. State, 24 N.E. 680 (Ind. 1890). A State might decide to modify New York's rule by holding that a tenant as well as an undertenant is bound

by guilty pleas of its employees to the sale of pornographic photographs. See 220 West 42 Associates v. Cohen, 302 N.Y.S. 2d 494 (1969). As is stated in Lindsay v. Normet, 405 U.S. 56, 92 S.Ct. 862 (1972), the Constitution has not federalized the substantive law of landlord-tenant relations, and therefore it is state law which governs.

It is the proclaimed policy of the Supreme Court to refuse to decide a federal question that is or might be controlled by a state ground of decision. Bell v. State of Maryland, 378 U.S. 439, 84 S.Ct. 1814 (1964). The Virginia courts have ruled that sufficient grounds for termination of the lease were shown by the Respondent. There are a number of ways in which the Petitioner's conduct might have been found to be in violation of the lease covenant, whether this conduct be done individually or through Petitioner's

employees, be it an express violation of law or merely against public policy, be it explicitly proscribed by the lease or merely found to be against the intentions of the parties, and be it an isolated incident or part of a sequence of illegal acts. The lower State courts might be right or wrong, but any remedy for error in applying State law rests with the State courts and legislature, and is not properly the subject of review by the Federal Courts.

B. No Substantial First or Fourteenth Amendment Issues Are Presented by the Petition for Writ of Certiorari.

The Petitioner contends that the action of the Trial Court in terminating its Lease with the Respondent Landlord imposes a "chill" on its First Amendment rights. The State Courts, however, merely

applied the terms of the Lease Agreement between the parties to the facts and evidence before it. If the Lease, as applied, meets Constitutional scrutiny, then the State Court's decree cannot be reversed on First or Fourteenth Amendment grounds.

Lindsay v. Normet, supra, provides that the Constitution has not federalized the substantive law of landlord-tenant relations. Moreover, the Court in Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, rejecting the holding in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601, ruled that:

> "The First and Fourteenth Amendments safeguard the right of free speech and assembly by limitations on State action, not an action by the owner of private property used nondiscriminatorily for private purposes only." 407 U.S. at 567, 92 S.Ct. at 2228 [emphasis supplied].

Lloyd then went on to hold that the owners of a shopping center were not prevented by the First Amendment from prohibiting distribution of handbills on its property. The Lloyd rationale was confirmed in Hudgens v. National Labor Relations Board, 424 U.S. 507, 96 S.Ct. 1029 (1976), where the Court ruled that union picketing at a shopping center was not protected by the First Amendment.

The rationale of Lloyd and Hudgens is directly applicable to the case at bar. Your Respondent, as the owner of a shopping center objected to the conduct of the Petitioner on Respondent's property, and ultimately prevailed in the State Courts on the theory of violation of the private property. Your Respondent is Constitutionally allowed to impose contract limitations on what might otherwise be First Amendment rights of the Petitioner

if exercised on public property. The First and Fourteenth Amendments are inapplicable to conduct by private persons, and the Petitioner thus fails to base his Petition upon substantial federal grounds.

CONCLUSION

The Respondent asserts that insufficient grounds exist for granting the Petition for Writ of Certiorari in that the Petitioner failed to make a timely and proper assertion of its federal questions in the State Courts, and further, that the Petition fails to present federal questions of substance. The construction and application of the Lease is governed by State law, as is the evidence which may be considered by the State Court, the weight to be given to a criminal conviction of an employee, and the scope of review by the State of the Trial Court's decision. Finally, the First and Fourteenth Amendments

are believed to be inapplicable to the Respondent's action to terminate the Lease because no "State action" is involved.

WHEREFORE, the Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LOUIS J. MARIN
Counsel for Respondent
1311A Dolley Madison Blvd.
Suite 3B
McLean, Virginia 22101
(703) 893-5551

APPENDIX "A"

PLAINTIFF'S TRIAL EXHIBIT NO. 3

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	Indictment
	)	Selling an
	)	Obscene Film
vs.	)	
	)	
ALLAN R. SANDS	)	NO. 22430

This 3rd day of March, 1976, came the Commonwealth, by her Attorney, and the Defendant, ALLAN R. SANDS, who stands indicted for a felony, to-wit: selling an obscene film, appeared agreeably in accordance with his recognizance of bail; also appeared Thomas J. Morris, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the roll was called and the following jurors took their seats in

the jury box, to-wit: Mrs. Alicia Boyd, Mrs. Ruby Schurtz, Alvin Fones, Miss Cynthia K. Lowery, J. T. Coffman, Mrs. Carole Seal, Leslie Mathias, Frank J. Hammond, David Leuthold, Mrs. Mary Lynn Acker, Mrs. Louise Hardardt and Edward Filipek.

Thereupon, the jury received instructions of the Court, heard the closing argument of the Attorney for the Commonwealth and of Counsel for the Defendant and rebuttal argument of the Attorney for the Commonwealth, and were sent to their room to consult upon their verdict, and after some time returned into Court and rendered the following verdict, to-wit:

> "We, the jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, regarding the film "Succulent Housewife," find the Defendant guilty as charged in the indictment.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury proceeded to hear argument on behalf of the Commonwealth and of the Defendant in regards to sentencing and were sent to their room to consult upon their sentence, and after some time returned into Court and rendered the following sentence, to-wit:

> "We the Jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, Defendant, regarding the film "Succulent Housewife", fix the Defendant's punishment at (12) months in jail.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury was discharged.

Thereupon, it was demanded of him, ALLAN R. SANDS, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that ALLAN R. SANDS do serve twelve (12) months in jail.

Thereupon, the Court proceeded to advise the Defendant of his right to appeal from the sentence theretofore imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

Thereupon, Counsel for the Defendant moved the Court to suspend the execution of sentence in this case and continue the Defendant on bond pending post-trail motions, which motion the Court granted, and this case is hereby continued to the 9th day of April, 1976, for hearing on post-trial motions.

The bond in this case is hereby increased to $2,500.00.

The Defendant is continued on bond, conditioned upon the posting of the

increased bond and that he do [does] not engage in the selling of any type of pornography.

/S/ WILLIAM G. PLUMMER
JUDGE

APPENDIX "B"

PLAINTIFF'S TRIAL EXHIBIT NO. 4

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	Indictment
	)	Selling an
	)	Obscene Film
	)	
vs.	)	
	)	
ALLAN R. SANDS	)	NO. 22429

This 3rd day of March, 1976, came the Commonwealth, by her Attorney, and the Defendant, ALLAN R. SANDS, who stands indicted for a felony, to-wit: selling an obscene film, appeared agreeably in accordance with his recognizance of bail; also appeared Thomas J. Morris, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

Whereupon, the roll was called and the following jurors took their seats in

the jury box, to-wit: Mrs. Alicia Boyd, Mrs. Ruby Schurtz, Alvin Fones, Miss Cynthia K. Loerty, J. T. Coffman, Mrs. Carole Seal, Leslie Mathias, Frank J. Hammond, David Leuthold, Mrs. Mary Lynn Acker, Mrs. Louis Hardardt and Edward Filpek.

Thereupon, the jury received instructions of the Court, heard the closing argument of the Attorney for the Commonwealth and of Counsel for the Defendant and rebuttal argument of the Attorney for the Commonwealth, and were sent to their room to consult upon their verdict, and after some time returned into Court and rendered the following verdict, to-wit:

> "We the Jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, Defendant, regarding the film "Don't Let the Bedbugs Bite," find the Defendant guilty as charged in the indictment.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury proceeded to hear argument on behalf of the Commonwealth and of the Defendant in regards to sentenc-int and were sent to their room to consult upon their sentence, and after some time returned into Court and rendered the follow-ing sentence, to-wit:

> "We, the Jury, on the issue joined in the case of Commonwealth of Virginia versus Allan R. Sands, Defendant, regarding the film "Don't Let the Bedbugs Bite," fix the Defendant's punishment at (12) twelve mo. in jail.
>
> Leslie N. Mathias
> Foreman."

Thereupon, the jury was discharged.

Thereupon, it was demanded of him, ALLAN R. SANDS, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that ALLAN R. SANDS do serve twelve (12) months in jail.

Thereupon, the Court proceeded to advise the Defendant of his right to appeal from the sentence heretofore im-posed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

Thereupon, Counsel for the Defend-ant moved the Court to suspend execution of sentence in this case and continue the Defendant on bond pending post-trial motions, which motion the Court granted and this case is hereby continued to the 9th day of April, 1976. Bond in this case is hereby increased to $2,500.00.

The Defendant is continued on bond, conditioned upon the posting of the in-

creased bond and that he do [does] not engage in the selling of any type of pornography.

/S/ WILLIAM G. PLUMMER
JUDGE

APPENDIX "C"

RULES OF THE SUPREME COURT OF VIRGINIA

RULE 1:1. FINALITY OF JUDGMENTS, ORDERS AND DECREES.

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error.